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Title: City of Pleasant Grove, Appellant
v.
United States

cketed:
nuary 23, 1986

Court: United States District Court
for the District of Columbia

Counsel for appellant: Corcoran Jr., Thomas G.

Counsel for appellee: Solicitor General

try	Date	Note	Proceedings and Orders
1	Jan 23 1986	G	Statement as to jurisdiction filed.
3	Feb 20 1986		Order extending time to file response to jurisdictional statement until March 24, 1986.
4	Mar 21 1986		Order further extending time to file response to jurisdictional statement until April 23, 1986.
5	Apr 23 1986		DISTRIBUTED. May 15, 1986
6	Apr 23 1986	X	Motion of appellee United States to affirm filed.
7	May 12 1986	X	Reply brief of appellant Pleasant Grove filed.
8	May 19 1986		PROBABLE JURISDICTION NOTED. *****
9	Jun 6 1986		Record filed.
J	Jul 3 1986		Brief amicus curiae of Washington Legal Foundation filed.
1	Jul 3 1986		Joint appendix filed.
2	Jul 3 1986		Brief of appellant Pleasant Grove filed.
3	Aug 1 1986		Brief of appellee United States filed.
4	Aug 2 1986	G	Motion of Democratic National Committee for leave to file a brief as amicus curiae filed.
5	Aug 26 1986		CIRCULATED.
5	Sep 24 1986		Motion of Democratic National Committee for leave to file a brief as amicus curiae GRANTED.
7	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 10, 1986. (3rd case) (1 hour).
8	Dec 3 1986	X	Reply brief of appellant Pleasant Grove filed.
9	Dec 10 1986		ARGUED.

85-1244

Supreme Court, U.S.

F I L E D

JAN 22 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States
District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Can the annexation of vacant land or land populated by one white family by a municipality with no black voters deny black voters the right to vote on account of race or color?

2. Can the annexation of vacant land or land populated by one white family be invalidated by a subsequent failure to annex land populated by black persons, where the failure to annex would not lead to a retrogression in black voting rights, but annexation of the land populated by blacks would lead to a retrogression in their voting rights?

3. Did the City of Pleasant Grove bear its burden of proof of showing that the annexation of Pleasant Grove Highlands would be economically disadvantageous by proving that revenues derived from the annexation of Pleasant Grove Highlands could not reasonably be expected to exceed between 14% and 28% of increased expenditures?*

*The City of Pleasant Grove and the United States of America were the only parties to the proceedings before the United States District Court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant

v.

THE UNITED STATES OF AMERICA,

Appellee

**On Appeal From The
United States District Court
for the District of Columbia**

JURISDICTIONAL STATEMENT

Appellant requests that the Court accept jurisdiction of this appeal and reverse the judgment below.

OPINION BELOW

The decision of the United States District Court for the District of Columbia, dated August 3, 1983, denying appellant's motions for summary judgment (App. B) is reported at 568 F. Supp. 1455 (D.D.C. 1983). The decision of the United States District Court for the District of Columbia dated October 25, 1985, denying appellant's claim for declaratory relief (App. A) is not yet reported.

JURISDICTION

This is an appeal from the decision of a 3-judge court convened pursuant to Title 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, denying a request for a declaratory judgment that certain proposed annexations did not have the purpose or effect of denying or abridging the right to vote on account of race or color, (App. A and C).

On December 19, 1985, appellant filed with the United States District Court for the District of Columbia a notice of appeal to this Court. (App. D).

This Court has jurisdiction under 42 U.S.C. §1973c to review the decision by way of appeal.

STATUTE INVOLVED

Section 1973c of Title 42 of the United States Code provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect

shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney

General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. [Emphasis in original text]

STATEMENT

The City of Pleasant Grove (hereinafter "Pleasant Grove") is a municipal corporation located in Jefferson County, Alabama. Although Pleasant Grove has

a few black residents, thirty-two (32) out of an approximate population of 7,100 as of October, 1981, at the time the annexation decisions in question here were taken all the registered voters were white.

On May 3, 1971, the Council of the City of Pleasant Grove voted to annex by city ordinance a 40-acre parcel to the north of Pleasant Grove inhabited by one extended all-white family consisting of fourteen (14) persons named Glasgow (the "Glasgow Addition"). On February 5, 1979, the Council of Pleasant Grove voted to annex approximately 450 uninhabited acres to the west of the city (the "Western Addition"), 50 acres of which were already the city's property. State Senator Mac Parsons was willing to introduce a bill annexing the land to Pleasant Grove in the Alabama State Senate only because the land in question was uninhabited. After unanimous consent by the Jefferson County delegation, the bill was passed by the Alabama legislature and signed by the Governor on July 17, 1979.

In April, 1979, approximately seventy-nine (79) registered voters from an area known as Five-Acre Road and an area then known as West Smithfield Manor which later changed its name to Pleasant Grove Highlands (hereinafter "Pleasant Grove Highlands") petitioned for annexation to Pleasant Grove. The inhabitants of these areas were black persons. Pleasant Grove never granted this petition.

After pre-clearance of the Western Addition annexation was denied by the Civil Rights Division of the Department of Justice (hereinafter the "Government"), Pleasant Grove, on October 9, 1980, filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment

that the annexation of the Western Addition did not have the purpose nor would it have the effect of denying or abridging the right to vote on account of race or color. As a condition of maintaining the action, the District Court required Pleasant Grove also to seek pre-clearance for the Glasgow Addition annexation, although Pleasant Grove represented that it would abandon that annexation rather than seek pre-clearance for it.

Pleasant Grove moved for summary judgment with respect to both annexations. It argued that since there were only white voters in Pleasant Grove and in the Glasgow Addition and no voters at all in the Western Addition, these annexations could have neither the purpose nor the effect of denying black persons the right to vote on account of race or color. The three-judge District Court, by a vote of two to one, denied the motion (App. B). It reasoned "(1) that in the context of annexation, the Voting Rights Act applies if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect and (2) that the failure to annex is a violation of the Act provided discriminatory purpose is shown" (App. 10b). The Court concluded that based on the record before it, a genuine issue of material fact was presented as to whether there had been a discriminatory purpose in Pleasant Grove's failure to annex Pleasant Grove Highlands. Judge George E. MacKinnon wrote in his dissent:

... Since the annexations at issue do not *change* any existing minority voting rights and the Voting Rights Act only applies when there is some "retrogression in the position of racial minorities with respect to their ef-

fective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), it is my view that the two annexations, one of which is inhabited by one non-minority family, cannot constitute a violation of the Voting Rights Act, regardless of the motives of the City. Accordingly, summary judgement is appropriate. [Emphasis in original text] [App. 14b-15b]

Thereafter, the case was submitted to the District Court on the record without trial. Pleasant Grove argued, based on the entire record, (1) that Pleasant Grove Highlands' petition was not treated less favorably procedurally than petitions from areas inhabited by white persons, (2) that Pleasant Grove's past practice had not been to annex areas which would be excluded from annexation on the rationale which denied annexation to Pleasant Grove Highlands, and (3) that the rationale advanced for denying annexation to Pleasant Grove Highlands was supported by the evidence. Pleasant Grove's past practice with respect to annexation had been to annex uninhabited or almost uninhabited land because it derived a substantial proportion of its revenues from land development. Although there had been annexations to Pleasant Grove, or parts of annexations, where there were motivations other than the economic advantage of development fees, no annexation had taken in an area considered as a whole with a development density greater than 0.1 structure per acre, which was the development density of the Glasgow Addition. Pleasant Grove Highlands, not including the Five Acre Road area which the Government conceded was not appropriate area for annexation, had a development

density greater than 1 structure per acre. Only land development fees made annexation economically advantageous, because, as the Government had conceded in the course of the proceedings, revenues which could be expected to rise in approximate proportion to population if the city were to annex Pleasant Grove Highlands would constitute only fourteen (14) to twenty-eight (28) percent of the city's expenditures depending on the year in which the calculation was made.

The District Court, again by a vote of two to one, ruled against Pleasant Grove. The court found (1) that the city had never conducted an economic study to determine the advantages and disadvantages of a particular annexation, (2) that Pleasant Grove's reliance on the determination of its "Annexation Committee," made during the course of litigation, that the annexation of Pleasant Grove Highlands was economically disadvantageous, was a sham, and (3) that substantively, Pleasant Grove's arguments concerning the cost of fire protection, street and sanitation, and police protection, and the loss of revenue from development fees if Pleasant Grove Highlands were annexed were unpersuasive. Finally, the trial court found that Pleasant Grove had adopted discriminatory policies with respect to matters other than annexation which suggested that discrimination motivated Pleasant Grove's annexation policy as well. Accordingly, the trial court denied pre-clearance. (App. 1a-12a)

The majority opinion did not address Pleasant Grove's principal contention. The failure of Pleasant Grove to conduct a formal economic study of the advantages or disadvantages of annexing Pleasant Grove Highlands could not be deemed significant where no

such study had been made for any other proposed annexation. Pleasant Grove had not either in making its annexation decision or in argument before the trial court relied on the activities of the Annexation Committee nor had Pleasant Grove relied on evidence that the annexation of Pleasant Grove Highlands would impose disproportionate demands on the fire department or the street and sanitation services (App. 23a). What Pleasant Grove did rely on was the loss of development fees, and to a much lesser extent a disproportionate burden on the police department.

Judge MacKinnon addressed these issues as follows:

The record, however, is in truth largely inconclusive on the comparative per capita costs to Pleasant Grove of providing vital services to the respective areas in question. Only as to police services was there any indication that petitioners might be more expensive, and the crime data was incomplete. Nonetheless, there is one very good fiscal reason that Pleasant Grove should prefer annexation of the Western Addition to that of the petitioners—and indeed prefer annexing any undeveloped area to most inhabited developed neighborhoods. The following statement, based on deposition and exhibits, sums up the City's financial situation:

The City of Pleasant Grove derives most of its revenue, not from taxes or the other usual impositions of city governments, but from the sale of water and natural gas. The City, through its Utilities Board, is the distributor of water

and natural gas for the area of Alabama which surrounds it. [Mays Affidavit, para. 3]. In the year ending September 30, 1980, Pleasant Grove's "Total revenues and transfers" were \$1,382,193. [Exhibit C to Attachment 3 to the Mays Affidavit]. "Revenues" contributed only \$449,341 of this amount. \$882,852 came from "Transfers from other funds." Of that \$882,852, \$871,852 was transferred from the Utilities Board of the City of Pleasant Grove. . . . "Revenues" provided only 28% of Pleasant Grove's expenditures in the fiscal year ending September 30, 1980.

[H]owever, not all items under "Revenues" could be expected to increase in approximate proportion to population if Pleasant Grove were to annex [petitioners]. . . . [T]he items of revenue which would grow proportionately with annexation total only \$255,404, which is only 14% of "Total expenditures and transfers" for 1980. [Mays Affidavit, para. 4].

Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at 10-11 (emphasis added). According to the deposition of the City's clerk and treasurer, Sarah Mays, the updated figure for revenues that should increase proportionately to population is 23%. Mays Deposition at 12. The government nowhere contests the accuracy of these figures

as a basic outline of the municipality's finances.

The City's heavy reliance on *profits* from the distribution of water and natural gas to the surrounding vicinity provides a powerful reason alone for aversion to annexation of already populated areas. Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services*. . . . [Emphasis in original text] [App. 23a-24a]

This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

- I. The annexation of vacant land or land containing one white family by a municipality with no black voters does not deny any black voter the right to vote on account of race or color.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, prohibits a State or political subdivision subject to Section 4 of the Act, 42 U.S.C. §1973b,¹ from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it (1) has obtained a declaratory judgment from the District Court of the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) has submitted the

¹The State of Alabama is subject to Section 4. 30 Fed. Reg. 9897 (August 6, 1965).

proposed change to the Attorney General and the Attorney General has not objected to it.

It is established that an annexation constitutes a change in a voting practice or procedure. *City of Richmond v. United States*, 422 U.S. 358 (1975); *Perkins v. Matthews*, 400 U.S. 379 (1971). As the test is set out in *City of Richmond, supra*, at 370-371, an annexation violates Section 5 if (1) it significantly reduces the proportion of voters of a particular race, and (2) the minority race has been denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community."

Because there were no black voters in Pleasant Grove at the time these annexation decisions were taken, only white voters in the Glasgow Addition, and no voters at all in the Western Addition, it is clear that these annexations neither reduced the proportion of black voters in Pleasant Grove nor denied black voters representation equivalent to their political strength in the enlarged community.

Because the proposed annexations could not conceivably have had the effect of denying blacks the right to vote on account of their race, there is no basis whatsoever for inferring that that was the purpose. A purpose of denying blacks the right to vote in Pleasant Grove would best be served not by annexation of additional land but by a policy of no growth, because the sale of any house in Pleasant Grove brings with it some chance that a black person will purchase it.²

²During the pendency of this lawsuit a black family moved into Pleasant Grove.

II. Pleasant Grove's subsequent failure to annex Pleasant Grove Highlands does not invalidate the decisions regarding the Glasgow and Western Additions because the failure to annex Pleasant Grove Highlands was not a change in a voting practice or procedure.

The Justice Department objected to the Glasgow and Western Additions not because it found any fault in those annexations *per se*, but because Pleasant Grove failed to act favorably on the annexation submitted some two months later by Pleasant Grove Highlands and Five-Acre Road. The District Court held that because Pleasant Grove had not affirmatively shown that there was no discriminatory purpose in the failure to annex Pleasant Grove Highlands, the annexation of the Western Addition approved two months earlier by the City Council and the annexation of the Glasgow Addition approved ten years earlier would not be pre-cleared.

This was error.

The residents of Pleasant Grove Highlands have never voted in Pleasant Grove. That they do not now vote in Pleasant Grove is thus not a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Section 5 of the Voting Rights Act does not require pre-clearance for a failure to change a voting practice or procedure.

This feature of Section 5 was explicitly recognized by this Court in *Beer v. United States, supra*, a case in which the City of New Orleans sought pre-clearance for its reapportionment of the city's councilmanic districts. The District Court had denied pre-clearance upon consideration of how two (2) at-large seats on

the seven (7) member council had affected minority voting strength "in the context of all circumstances touching the right to vote in councilmanic elections," *Beer v. United States*, 374 F. Supp. 363, 400 (D.D.C. 1974), although elections for the two at-large seats had been conducted in that fashion since 1954 and were not changed by the proposed reapportionment. On appeal to this Court, however, the United States reversed the position it had taken in the trial court and agreed with appellants that the District Court was mistaken in rejecting New Orleans' proposal because it did not eliminate the two (2) at-large seats. This Court wrote:

The appellants and the United States are correct in their interpretation of the statute in this regard.

The language of §5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices ... instituted prior to November 1964 ... are not subject to the requirement of preclearance [under §5]." U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After*, 347. The ordinance that adopted [the reapportionment plan] made no reference to the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in the charter would have required approval by the city's voters. The at-large seats, having existed without change since 1954, were not subject to review in this proceeding under §5. [*Beer*

v. United States, 425 U.S. 130, at 138-139 (1976)]

If Pleasant Grove were to attempt to annex Pleasant Grove Highlands, the annexation would be subject to pre-clearance under Section 5. Instead of voting as a part of a significant minority in Jefferson County (where two (2) out of eight (8) State Senators in the County delegation were black in 1979), the blacks residing in Pleasant Grove Highlands would vote as an insignificant minority in a city where all councilmanic seats are elected at large. Such an annexation would fail both prongs of the test in *City of Richmond, supra*. It would significantly reduce the proportion of black voters in the place where they were voting, and, because of the at-large feature of Pleasant Grove's system, it would deny black voters representation reasonably equivalent to their political strength in the enlarged community.

If it seems anomalous that the Government should argue for such a result, that is because it is anomalous. But for this case, the Government has never objected to an annexation where the municipality requesting annexation had no black voters and the area annexed had no black voters [Defendant's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 4; App. 22a]. What the Government is attempting to do, we respectfully submit, is not to protect the voting rights of the black residents of Pleasant Grove Highlands, but to procure for those residents the economic benefits which automatically accrue if the area is annexed to Pleasant Grove at the expense of their rights to reasonably proportionate representation in voting. There is no doubt, as we show *infra*, that the residents of Pleasant Grove

Highlands would derive great economic benefits from being annexed to Pleasant Grove and that Pleasant Grove would suffer corresponding economic detriment, but that is not the end sought by the passage of the Voting Rights Act of 1965.

III. The conclusion that the annexation of Pleasant Grove Highlands to the City of Pleasant Grove would not be in the financial interest of the City is clearly correct.

In the statement of genuine issues attached to the Government's response to Pleasant Grove's Motion for Summary Judgment (para. 1), the Government stated that it "d[id] not contest" the following material facts asserted by Pleasant Grove not to be in issue:

"Revenues" provided only 28% of Pleasant Grove's "Total expenditures and transfers" in the fiscal year ending September 30, 1980. Those "Revenues" which could be expected to increase in approximate proportion to population if Pleasant Grove were to annex West Smithfield Manor are approximately 14% of "Total expenditures and transfers." (Mays Affidavit, paras. 3-4, Attachments 2-3) [Plaintiff's statement of materials facts attached to Motion for Summary Judgment, Argument III]³

It follows inexorably, that Pleasant Grove should not annex developed property. Even if it is true, as the Government asserted below, that Pleasant Grove Highlands would be no more an economic burden on

³The 14% figure varied somewhat from year to year. In the fiscal year ending September 30, 1983, the figure was 23%.

Pleasant Grove than are the white residential areas which are already in the city, that would not justify its annexation, since *ad valorem* taxes could only provide between 14% and 28% of additional expenses. Development fees constitute an important source of city income, and it is only those fees which make annexation economically advantageous. If Pleasant Grove should decide to bring seventy-nine (79) already built homes into the city by way of annexation of Pleasant Grove Highlands instead of building those homes within the city, the city would give up \$45,820 in development fees from the 79 houses. \$45,820 is thus what it costs Pleasant Grove to annex the developed area of Pleasant Grove Highlands rather than an area of similar size in the area of the Western Addition.

As Judge McKinnon wrote in dissent:

Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services.* [Emphasis in original] [App. 24a]

IV. The Interests at Stake are Important.

Under the decision below, the Government can use the Voting Rights Act of 1965, not as this Court said in *Beer v. U.S.*, *supra*, to prevent "retrogression in the position of racial minorities with respect to the effective exercise of their franchise," but rather as a general lever to force covered municipalities to support racial minorities in any way in which the Civil Rights Division of the Department of Justice finds appropriate. It is entirely clear, in the instant case, that if Pleasant Grove Highlands had been annexed

by Pleasant Grove, which elects its City Council at large, the votes from some 79 minority householders in a population of approximately 7,100 would have no significant effect on the city's elections. That is, the annexation of Pleasant Grove Highlands, the result which the Civil Rights Division seeks in this case, would have the effect of reducing minority voting rights in violation of Section 5 of the Voting Rights Act. Needless to say, Congress did not intend such a result when it passed the Voting Rights Act.

WHEREFORE, appellant respectfully submits that the questions presented are so substantial as to inquire plenary consideration.

Respectfully submitted,
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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FILED
October 25, 1985

OPINION

Before George E. MacKinnon, *Senior Circuit Judge*, Aubrey E. Robinson, Jr., and Harold H. Greene, *District Judges*.

HAROLD H. GREENE, District Judge. On October 9, 1980, the City of Pleasant Grove, a community in Jefferson County, Alabama, brought this action under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, seeking a declaration that the annexation by the city of the so-called "Western Addition" did not have the purpose or effect of denying or abridging the right to vote on account of race or color. In March 1982, plaintiff moved for sum-

mary judgment,¹ and on August 3, 1983, after a hearing, the Court denied plaintiff's motion. *City of Pleasant Grove v. United States*, 568 F. Supp. 1455 (D.D.C. 1983).

The Court's opinion on the motion and Judge MacKinnon's dissent focused on the question whether a community without black voters would be in violation of the Act by annexing areas inhabited by whites while refusing to annex similarly situated, contiguous areas inhabited by blacks. On that issue, the Court held that, in the context of annexation, a violation occurs upon a showing of discriminatory purpose alone, and that it was not significant in terms of the Voting Rights Act that, since there were no black voters in the City of Pleasant Grove, there could be no dilution of the voting rights of blacks and hence no discriminatory effect. The Court further decided that a political entity may not annex adjacent white areas while applying a wholly different standard to adjacent black areas and failing to annex them based upon that discriminatory standard. 568 F. Supp. at 1460.

That decision is, of course, the law of the case. *Fogel v. Chestnutt*, 668 F.2d 100, 108-09 (2d Cir. 1981); *Handi Investment Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); *United States v. Fernandez*, 506 F.2d 1200, 1204 (2d Cir. 1974); *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967); *Schupak v. Califano*, 454 F. Supp. 105, 114 (E.D.N.Y. 1978). See generally 1B *Moore's Federal Practice* paragraphs 0.404[1], 0.404[4.-1].

¹The complaint initially sought declaratory relief only with respect to the annexation of the Western Addition, and on May 15, 1981, plaintiff filed a motion for summary judgment as to this single annexation. On October 7, 1981, the Court ordered plaintiff to amend its complaint to include a second annexation, accomplished in 1971, which had not been precleared with the Department of Justice—the so-called “Glasgow Addition.” Plaintiff amended its complaint and then moved for partial summary judgment as to the Glasgow Addition, requesting a finding that its annexation, too, did not have the purpose or effect of denying or abridging the right to vote on account of race or color. That annexation is therefore likewise before us.

The action is now before the Court on the merits and, as the plaintiff, the City of Pleasant Grove has the burden of proof. *City of Rome v. United States*, 446 U.S. 156, 162, 183-87 (1980); *City of Richmond v. United States*, 422 U.S. 358, 362 (1975); *Georgia v. United States*, 411 U.S. 526, 538 (1973); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1010-11 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982); *Mississippi v. United States*, 490 F. Supp. 569, 581 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1027 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973).

It is in this procedural framework that the Court now considers the factual issues.

I

During its history, Pleasant Grove approved the following four annexation requests: a parcel of land to the southeast of the city (1945); land in the northern, southern, and western areas (1967); the Glasgow Addition (1971); and the Western Addition (1979).² None of these areas had any black residents. During the same period, the city rejected annexation petitions from the Woodward School (August, 1971),³ the Pleasant Grove Highlands (April 18, 1979); and

²In August of 1969, a committee from Sylvan Springs and the West Grove area (both inhabited by whites) requested Pleasant Grove to consider consolidation with the former and annexation of the latter. This petition for annexation was actively pursued and facilitated by Pleasant Grove, but the annexation was blocked by the United States Steel Corporation, which, as an intervening property owner, had the legal right to do so. This Opinion constitutes the findings of fact and conclusions of law required by Rule 52, Fed. R. Civ. P.

³The city refused to annex the site on which the “black” Woodward School was located in order to avoid federal court school desegregation orders.

the Dolomite area (October, 1979). Each of these areas has been identified as a "black" area.⁴

The annexations directly at issue in this proceeding are those of the Western Addition (Western), the Glasgow Addition (Glasgow), and the Pleasant Grove Highlands (Highlands). The basic rationale offered by Pleasant Grove in discharge of its burden of proof is that its decisions to annex the "white" Western⁵ and Glasgow areas, but not the "black" Highlands, were based not on race but on the city's economic self-interest.

In support of that rationale, Pleasant Grove adduced evidence⁶ tending to show that, when the residents of the Highlands requested annexation (some two months after the annexation of Western), the mayor of Pleasant Grove appointed a committee to investigate. That committee, it is said, reported to the City Council that annexation would not be financially advantageous, and a second committee later likewise concluded that annexation would be economically costly to the city.⁷ The principal substantive contentions Pleasant Grove is making in support of these

⁴Pleasant Grove also refused to annex the Kohler (1969) and Westminster (1977-78) parcels which were inhabited by whites, because such annexations might have a "mushroom effect" leading to subsequent annexations of adjacent black areas. Patrick Deposition of April 2, 1981 at 55-56, 102-104.

⁵While the Western Addition is undeveloped, its location and the City's plans indicate that it is likely to be developed for use by white persons only.

⁶The parties submitted to the Court their affidavits, depositions, answers to interrogatories, admissions, and exhibits, and they stipulated that the Court may render its decision on the merits based on that record without the need for the taking of additional evidence at a trial.

⁷The chairman of the second committee testified that he decided to take no action on the request because no one had approached the City since his election to the Council in October, 1980; the matter was already in litigation; and he did not want to make any decision which would expose him to a race discrimination suit. Mosley Deposition of January 11, 1984, Part I at 15, Part II at 23-24, Plaintiff's Brief at 9.

conclusions are (1) that by annexing the Highlands, it would give up approximately \$59,000 in development fees,⁸ and (2) that the Highlands, unlike the "white" areas which had recently been annexed, requires more than its per capita share of City revenues, particularly in the form of police, fire, and sanitation services. We find, based on the evidence, that these contentions are without merit, and that they are a mere pretext for race-biased annexation decisions.

II

First. Neither in connection with the Highlands' petition nor at any other time did Pleasant Grove conduct an economic study to determine the advantages and disadvantages of a particular annexation; all the economic conclusions reached in this regard were developed after the fact. The evidence clearly shows that the City did not assess the economic or other impacts of annexation prior to its decision not to annex the Highlands,⁹ and that it likewise performed no such studies in connection with its decisions to annex the Western and the Glasgow areas.

Second. Pleasant Grove's reliance upon the determination of its so-called "Annexation Committee"—that annexation of the Highlands would be too costly—is unpersuasive for other reasons as well. Although the City asserts that the committee was established in March, 1981 to consider economic impacts, committee members have testified that they were not notified of their appointments

⁸Plaintiff's Brief at 9. Sarah A. Mays, the City Clerk of the City of Pleasant Grove and the Secretary-Treasurer of the Utilities Board, stated that the City would give up \$45,820 in development fees if it annexed the Highlands (which consists of 79 houses) instead of building those houses within the city. Mays Deposition of January 13, 1984 at 19 and Exhibit 14 thereto.

⁹Or intend its decisions not to annex the Dolomite, Kohler, and Westminster areas. See note 4, *supra*.

until one year later.¹⁰ It is likewise established that, if the committee met at all, it did so only once and then only on an informal basis, and that it never gathered its own information, but what data it had were provided to it by the Mayor from various city department heads who had already prejudged the issue.¹¹ The committee never questioned these individuals regarding economic issues; it generated no documents; and it made no official report to the City Council. Based on these uncontroverted facts, it is difficult to escape the conclusion that reliance by the City on the committee's recommendation for its decision not to annex Pleasant Grove Highlands is a sham.¹²

Third. Substantively, the economic justification presented to the Court for the City's failure to annex the

¹⁰The Annexation Committee was made up of James (or "Pete") Mosley, Clyde Morgan, and Joe Cooper. Mosley averred that he was notified of the formation of the Committee shortly before receiving the Mayor's letter with enclosures concerning the estimated costs of providing services to the Highlands, dated May 24, 1982. Mosley Deposition of January 11, 1984, at 10-11.

Morgan likewise stated that he was appointed to the committee at approximately the same time as the letter was sent. Morgan Deposition of January 11, 1984 at 7. And Cooper, the third alleged member of the Committee, has no recollection of ever being appointed or serving on the second committee. Cooper Deposition of January 11, 1984 at 7-8.

¹¹In his letter to the Committee Chairman, the Mayor gave his opinion that "it is the general consensus of all concerned that the costs of annexing [the Highlands] would be prohibitive, based upon the projected revenues that would be derived from same." Letter to Mr. Pete Mosley, Chairman, from Mayor Donald R. Morrison dated May 24, 1982. Govt's Exhibit 1 to January 11, 1984 Mosley Deposition.

¹²Indeed, only one member of the Committee, Pete Mosley, reached a conclusion concerning the desirability of annexing the Highlands, and his decision was based largely, if not entirely, on the fact that the matter was in litigation. See January 11, 1984 Deposition of Mosley, Part I at 15, 18-20, Part II at 23-24.

Highlands is no more persuasive.¹³ The factors that have been cited in that regard are fire protection, streets and sanitation, police protection, and revenues from development fees.

A. The Pleasant Grove fire chief has stated that the annexation of the Highlands would have generated the need for three additional firefighters/paramedics and one additional rescue truck, at considerable cost to the city. That projection was entirely without factual basis, for the city was already providing free fire, police, and paramedic services to the Highlands, area, and thus *no* additional monies would have been needed as a consequence of annexation. The fire chief's projection is dubious for another reason as well: the anticipated cost for serving the 79 homes in the Highlands was more than the estimated cost of serving the 700 projected homes in the Western addition although the former is more easily accessible than the latter.

B. Similar problems exist with respect to the City's findings concerning the respective costs of providing street and sanitation services to the Highlands as opposed to the Western Addition. Those responsible for calculating the costs of these services applied entirely different cost methods for the needs of the Highlands than they did for those of the Western Addition. If the same method of calculating costs are applied to both areas, the cost to the city would be, depending upon the formula used, either \$20,000 for

¹³In connection with the City's reliance on the economic disadvantages allegedly flowing from an annexation of the Highlands, it is interesting to note that the Glasgow annexation, which the City did effect, was an economic drawback to it because of its inaccessibility to city fire and police services. That area, in fact, was annexed solely because of the personal relationship between city officials and the Glasgows who were described as "fine people" whom the city residents "would be proud to have in Pleasant Grove." Deposition of Councilmember Clyde E. Morgan of December 17, 1981, at 15, 17-18. Needless to say (see Part III *infra*), there were no expressions of opinion from city officials that the black inhabitants of the Highlands were "fine people" whom the City "would be proud to have" as members of the community.

the Western Addition and zero for the Highlands,¹⁴ or \$81,900 for the Western Addition and \$6,917.24 for the Highlands.¹⁵ In short, under either method, the cost of providing street and sanitation services to Western far exceeds the cost of providing such services to the Highlands.

C. On the issue of police protection, the City's high cost estimates for the Highlands were based primarily upon the view expressed by the police chief, that the black residents of the Highlands were more "crime prone."¹⁶ Actually, to the extent that the statistics support that assessment at all,¹⁷ they are explained by the fact that the Highlands was a "new" neighborhood still lacking cohesion.¹⁸ In any

¹⁴Plaintiff stated that, as a result of anticipated development in the Western Addition, it would have to hire two additional sanitation workers at a cost of \$10,000 each per year. No such additional personnel would be needed to service the 79 homes in the Highlands, however, because the residents offered to continue their private garbage collection after annexation. Graham Deposition of April 7, 1981 at 13 and 34. In any event, the City Clerk testified that the Department staff is currently underutilized. Mays Deposition of January 13, 1984 at 44-45.

¹⁵These figures are based on the 1980 average cost of street and sanitation services per household of \$87.56. George Parkin, Superintendent Streets and Sanitation Department, used this figure to calculate the cost of providing services to the Highlands. Government's Exhibit 1 to Mosley Deposition of January 11, 1984.

¹⁶Police Chief Robert L. Love deposition of January 12, 1984 at 18.

¹⁷Chief Love based his opinion on a comparison of the number of burglaries committed in the Highlands between July 20, 1978 and January 3, 1979 with the number of burglaries committed in the City of Pleasant Grove during 1980. The available data for theft during this same high-crime period, however, indicates that the Highlands had a lower incident of theft than did Pleasant Grove. Only one theft was reported in the Highlands (79 homes, .013 thefts per household) whereas 79 thefts were reported in Pleasant Grove (2,400 homes, .033 thefts per household). Plaintiff's Exhibit 1 to Waldon Deposition of January 12, 1984 and attachments.

¹⁸January 12, 1984 Deposition of Detective Sergeant Waldon at 14-15. Burglaries in the Highlands declined from 25 in 1978 to 16 in 1979, to 13 in 1980, and to 2 in the first nine months of 1981. Plaintiff's Exhibit 1 to Waldon Deposition and attachments.

event—as is true with respect to the provision of fire and paramedic service—the Pleasant Grove police department already responds to calls in the Highlands, and the annexation therefore should not generate any additional costs.¹⁹

D. As concerns finally the question of revenues from new development, Pleasant Grove relies primarily upon the fact that if the city brought in the 79 already-existing homes in the Highlands, as distinguished from having an equal number of new houses built within the city, it would lose \$45,820 in development fees. That argument fails entirely to consider, however, that annexation of the Highlands would generate immediate *ad valorem* [sic] tax revenues for the city, and that the Highlands area contains sufficient undeveloped land to allow the construction of 80 new homes.

Pleasant Grove also estimated that the annexation of the Western Addition would generate anywhere from \$768,250 to \$1,424,500 in development fees over a four year period,²⁰ in the form of building permits, subcontractors' licenses, increased property taxes, and the like. These figures, however, are shown by the record to be highly inflated. For example, the City's estimated annual tax revenue for the new Western homes exceed those of the City's most expensive neighborhoods. Moreover, on economic grounds other than development fees, the annexa-

¹⁹No new police costs were projected for the Western Addition even though Chief Love testified that development of this area would also require new resources. Love deposition of January 13, 1984 at 9-10.

²⁰Plaintiff's counsel stated in a letter of August 20, 1980 to the government that the City's total estimated revenue from development fees over the next four years would be \$768,250. Government Exhibit 1 to Mosley Deposition of January 11, 1984. In a letter dated July 14, 1980 to plaintiff's counsel, the Mayor of Pleasant Grove estimated that the development fees and receipts expected from the annexed area for the next four year period would be \$1,014,600. Government Exhibit 3 to Mosley Deposition. A month earlier, however, the Mayor had estimated that the City would receive \$1,424,500 in development fees from the annexation of Western. Government Exhibit 2 to Mosley Deposition.

tion of the Western Addition appears to be more costly to the City than the annexation of the Highlands.²¹

We find that the economic justification advanced by Pleasant Grove for its annexation practices is flawed both procedurally and substantively, and that it is no more than a transparent attempt to put a valid gloss on decisions which plainly had a racial purpose.

III

In addition to the evidence of the disparate approach Pleasant Grove took with respect to almost every phase of its economic analysis of the proposed annexations, there is ample evidence before the Court that the City adopted racially-discriminatory policies with respect to matters other than annexation. As a matter of law, the Court may, and it does, infer on the basis of this evidence as well that racial bias was the purpose of Pleasant Grove's annexation policy.²²

From the 1940s to the present, Pleasant Grove's housing and zoning policies have been designed to exclude blacks from the City. This was done either directly²³ or through

²¹Thus, the overall projected cost of annexing Western fails to take into account such necessary construction as a new fire station, a major traffic artery, and a new neighborhood park.

Beyond that, even if it were to be assumed that Pleasant Grove would not fare as well with respect to the one item of development income by annexing the Highlands as by failing to do so, the City clearly did not know this when it rejected the Highlands petition.

²²See *Rogers v. Lodge*, 458 U.S. 613, 624-26 (1982); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

²³In the early 1940s, the Pleasant Grove City Council acted to prevent the construction of a "colored housing project" within the City, and it directed the City attorney to draft a zoning ordinance designed to "restrict colored property." See Minutes of Pleasant Grove Town Council Meeting of November 3, 1941. In fact, the Town Clerk was instructed to write Mr. Pill of the Woodward Iron Co., that the City sincerely desired that he would not sell any land within the corporate limits for a "colored housing project," and that it highly encouraged

its efforts to exclude apartment construction (in the belief that apartment housing was likely to be occupied by blacks).²⁴ Moreover, Pleasant Grove has managed to maintain an all-white residential community by operating a dual white-black housing market through a variety of devices, such as advertising and marketing directed exclusively to white buyers, and racial steering.²⁵

Pleasant Grove has likewise made clear its policy of hostility to the presence of blacks in subjects other than housing. The City has never hired a black person, preferring to draw its employees from as far away as fifty miles rather than to hire blacks living in surrounding Jefferson County, which is one-third black. When a federal court in 1969 required the County to abandon its segregated school system,²⁶ Pleasant Grove voted to secede from the county school system on the evening of the very day the court's order was issued. The City established its own separate "white" school system, financing it with extraordinary taxes,²⁷ and funds diverted from the municipal utility sys-

the project to be "built outside so as to avoid conflict with our zoning ordinance." Exhibit 12 to Response of the United States to Plaintiff's Motion for Summary Judgment filed on March 26, 1982 (hereinafter Government's Response Brief) (emphasis in the original). In the Town Council meeting of November 1, 1943, the Town Clerk was instructed to contact the City attorney concerning a zoning ordinance to restrict "colored" property and business districts and white residential property within the corporate limits. Exhibit 13 to Government's Response Brief.

²⁴See Milton C. Russell Deposition of April 3, 1981 at 22-24. See also Bobby R. Patrick Deposition of December 17, 1981 at 40. The City's restrictive zoning ordinance prohibiting the construction of apartments was struck down by a federal court on the ground that it had a racially-exclusionary effect. *Wheeler v. City of Pleasant Grove*, C.A. No. 78-F-1150-S (N.D. Ga. 1979).

²⁵See Joe Nathan Dickson Deposition of April 17, 1981 at 8-14, 17-18, 27-29; Albert Mason Deposition of April 7, 1981 at 21-22, 26-27; Billy F. Graham Deposition of April 7, 1981 at 7-10.

²⁶*Stout v. Jefferson County Board of Education*, C.A. No. 65-396 (N. D. Ala. 1969).

²⁷In addition to enacting higher sales and other taxes, the City Council raised the ad valorem property tax rate to the highest level in Jefferson County.

tem.²⁸ These actions, and others,²⁹ demonstrate that the City of Pleasant Grove has attempted to exclude blacks from becoming residents of the City and all facets of City life, including voting in municipal elections, and that it has, in fact, succeeded in doing so. As the *Rogers* and *Busbee* cases, cited *supra*, hold, such actions are valid evidence of discriminatory purpose in a voting rights action.

The mass of evidence of a specific racially-biased annexation policy, supported by what must be, for this day and age, an astonishing hostility to the presence and the rights of black Americans, far overshadows and outweighs the City's feeble effort to portray its annexation policy as economically motivated. We find that the economic rationale advanced by Pleasant Grove is pretextual, and that the city has wholly failed to carry its burden of establishing that its annexation policy does not have the purpose of denying or abridging the right to vote on account of race or color.³⁰

For these reasons, it is the judgment of this Court that the request of plaintiff for preclearance of the annexations of the Western and the Glasgow Additions pursuant to section 5 of the Voting Rights Act must and will be denied.

MackINNON, *Senior Circuit Judge* (dissenting): The City of Pleasant Grove is a small municipal corporation in Alabama which is a suburb of the City of Birmingham. At

²⁸That separate school system was ultimately abolished in 1972, by another federal court order. *Stout v. Jefferson County Board of Education*, No. 72-1102, *aff'd*, 466 F.2d 1213 (5th Cir. 1972).

²⁹Among other things, the Pleasant Grove City Council authorized the formation of a chapter of the White Citizens Councils, it thanked Governor George Wallace for his fight against desegregation, and it condemned the Birmingham Bar Association for its expression of moral support to Judge Samuel Pointer of the U.S. District Court for the Northern District of Alabama for his efforts in *Stout*.

³⁰Even if the burden of proof were on the United States—which it is not—we would have had no difficulty in finding that the annexation policy of Pleasant Grove is, by design, racially-discriminatory in violation of the Voting Rights Act.

times here relevant it had a population of 7,086, all of whom were white citizens except for one Oriental and 32 blacks who live in two nursing homes and require 24 hour-a-day supervision. There are no black voters in Pleasant Grove. This case involves primarily the annexation of the Western Addition, a large tract of *completely vacant land* that is contiguous to the western boundary of the City. The 1969 annexation of the much smaller Glasgow Addition, inhabited only by the white citizens of the Glasgow family, is also involved in this case. Despite the absence of any affirmative duty under section 5 of the Voting Rights Act for an electoral district to improve the position of minority voters or to reduce the strength of a majority, my colleagues decide that these annexations violate the *Voting Rights Act* because the City Council did not *subsequently* annex an area south of the City that is *inhabited* completely by black citizens. The majority have thus in effect denied preclearance of the annexation of both the Western and Glasgow Additions. While Pleasant Grove has a history of past racially discriminatory conduct, in my opinion subject annexations do not violate the Voting Rights Act. Pleasant Grove, moreover, has clearly met its burden by showing an economic justification for the annexation of the Western Addition.

I.

The Western Addition is a tract of *completely vacant land* contiguous to the western boundary of Pleasant Grove. The City of Pleasant Grove owns 50 acres of the land and the Mead Corporation and Gary H. Dobbs, Sr. owns the remainder, estimated from the map at approximately 389 acres. In the latter part of 1978, these owners contacted the mayor of Pleasant Grove and requested annexation of the Western Addition to Pleasant Grove. The proposal came before the Municipal Council on February 5, 1979. On that date the Council adopted a resolution, four to one (abstention), annexing the Western Addition. Since the Western Addition was completely vacant land with no residents, and thus no person would be made a

resident of Pleasant Grove without an opportunity to vote on the issue, the local state senator introduced legislation in the Alabama legislature to formalize the annexation. The bill was advertised in local newspapers in February and March 1979.¹

Shortly thereafter, some residents of nearby West Smithfield Manor² ("Smithfield") filed a petition jointly with some citizens of the adjacent "Five Acre Road" area (collectively "petitioners") requesting annexation to Pleasant Grove. Petitioners' areas are inhabited completely by black citizens. The petitioners' request came before the Council on May 7, 1979, and was referred to a committee. The Smithfield petitioners explained that they sought annexation to Pleasant Grove because, according to the newspapers, Pleasant Grove was withdrawing their free fire protection. The continuation of paramedic services was also in doubt. At a meeting of the Pleasant Grove Council on June 18, 1979, however, the Council voted to continue providing free fire protection to Smithfield, and later paramedic services were also continued. The Council took no further action on petitioners' request for annexation.

The Attorney General denied preclearance for the annexation of the Western Addition because the predominantly black Smithfield and the Five Acre Road areas had not been annexed by Pleasant Grove. Pleasant Grove subsequently brought in this court an action under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982), seeking a declaratory judgment that the annexation of the vacant land in the Western Addition did "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."

Pleasant Grove later amended its complaint, pursuant to order of this court, to include the much smaller an-

¹The bill was signed by the Governor on July 17, 1979.

²The name of West Smithfield Manor was changed to Pleasant Grove Highlands after its petition for annexation was filed. There were approximately 80 black families in the Highlands. See Defendant's Statement of Genuine Issues at 3.

nexation 10 years before, in 1969, of the Glasgow Addition, which had not previously been approved. The Glasgow Addition is contiguous to Pleasant Grove on its northern boundary and, according to measurement of the map, comprises an area of slightly less than 40 acres. In 1969 the area contained four houses all belonging to the Glasgow family. Two houses have since been added. The population was 14 in 1969 and is currently 20; all are members of the Glasgow family, and are white. Otherwise the area is completely devoid of inhabitants.

Initially this court denied plaintiff's motion for summary judgment, *City of Pleasant Grove v. United States*, 568 F. Supp. 1455 (D.D.C. 1983), and the matter then came on for hearing on the merits. The majority today holds that the City's proposed annexation violates the Voting Rights Act. Although the City of Pleasant Grove has a history of racial discrimination in other respects, in my opinion, it cannot be said that the City has violated the Voting Rights Act by subject annexations. A violation of the Act requires a "den[ial] or abridg[ment] of voting rights on account of race or color." Incapable of finding any such effect, the majority finds a violation based on past racial discrimination in respects other than voting and on bare speculative future *illegal* discrimination in other respects that arguably would result in *speculative* dilution. As is demonstrated below, however, this conclusion is based on a number of assumptions that in truth are not supported by the record or by reason.

II.

As stated above, the annexed 430 acre Western Addition is completely uninhabited and the Glasgow Addition was practically *uninhabited*. Yet the majority opinion makes numerous references to the Western and Glasgow Additions as being "*inhabited by whites*."³ There is not a single

³In footnote 5 my colleagues state "while the Western Addition is undeveloped, its location and the city's plans indicate that it is *likely* to be developed for use by white persons only" (emphasis added). Never-

person, however, white or black, living in the large 430 acre area covered by the Western Addition, and the much smaller Glasgow Addition includes members of one family only—the Glasgows. But this mischaracterization of the facts is necessary to support the fallacious theory of my colleagues that these areas should be treated as being inhabited *solely* by white citizens because Pleasant Grove, through the years, has managed to remain all white in part by following racially discriminatory practices. The majority therefore treats the annexation of vacant land exactly as if that land were already inhabited exclusively by whites. The majority thus treats its speculation as to the future development of the Western Addition to Pleasant Grove as a fact upon which a Voting Rights Act violation can be predicated.⁴

The majority is apparently persuaded by the government's assertion that the uninhabited areas should be treated as "white" areas. The weakness in the government's evidence, however, is apparent in its response to the plaintiff's first set of interrogatories, which indicates

theless, my colleagues continue to state that the annexations are *white areas*. They reason illogically that if it is *likely* to be developed it *must* be treated as a white area. The majority assumes that the City will lawlessly participate in the segregated development of the Western Addition. While I recognize that the City has acted previously in a racially discriminatory fashion, I am unwilling to fully join the majority's assumption as to the City's future conduct. Moreover, if the City does discriminate on the basis of race or color in developing the Western Addition, federal redress would be available by an action under the Fourteenth Amendment or the more appropriate Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1982). However, since the majority's fears are based on historical practices, I would issue an injunction under the Voting Rights Act. *See discussion infra.*

⁴It must be kept in mind that the City's refusal to approve the annexation requests of the Smithfield, Five Acre Road, and Dolomite areas is not at issue in this action. On the authority of *Beer v. United States*, 425 U.S. 130 (1976), it is clear that section 5 of the Voting Rights Act does not apply to the refusal to alter electoral procedures. Thus the City's failure to annex these areas is not properly before the court, although the majority seems unaware of this point. *See Maj. Op. at 4.*

that the government refused to approve the annexation of the Western Addition and Glasgow areas because "said land was annexed for the express purpose of residential construction, *which houses will be occupied by white persons.*" As indicated above, the italicized statement is completely speculative. The government points to the fact that the other annexations have generally developed with completely white populations. However, there is absolutely no way to guarantee, much less safely predict, that newly annexed areas will be occupied exclusively by white citizens or by black citizens. Even if the annexed areas become generally white, this will not necessary [sic] be the result of illegal discrimination. The majority, however, writes as if the City has an affirmative duty to pursue an annexation policy which will result in a higher proportion of voting blacks within the City. But the existence of such a duty has been explicitly denied by the Supreme Court in its interpretation of the Voting Rights Act. *See discussion infra.* Whenever land in the Western Addition is available for purchase, there is always the possibility that it will be bought by a black citizen.

My colleagues further state:

The Court [meaning the majority opinion on the motion] further decided that a political entity may not annex *adjacent white areas* while applying a wholly different standard to adjacent black areas and failing to annex them based upon that discriminatory standard. 568 F. Supp. at 1460.

Maj. Op. at—. They contend that this statement from the prior majority decision states the law of the case. But it is *not* the law of the case because it is based on facts that are *not* the facts of this case. The true facts here bring into play *uninhabited* and black inhabited areas—not white and black *inhabited* areas.⁵

⁵The 40 acre Glasgow Addition differs from the Western Addition insofar as it was inhabited by 14 white citizens at the time of annexation, in contrast to the 430 acres of completely vacant land in the

My colleagues spell out numerous racially discriminatory practices by Pleasant Grove over the last 45 years. These practices include racial discrimination in zoning and hiring, racial steering in the housing market, school segregation and discriminatory annexation. While some are overstated and recognize no adverse or ameliorative explanation, the allegations of substantial historical racial discrimination are generally accurate. The majority has some reason to conclude that Pleasant Grove has successfully excluded black citizens from becoming residents and from practically *all* facets of its local life. The court, relying upon *Rogers v. Lodge*, 458 U.S. 613, 624-26 (1982) (discrimination in at-large voting), and *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) (reapportionment of congressional districts splitting composite black areas to minimize possibility of electing a black candidate), however, goes further and concludes that such historic discrimination in other respects validly evidences the discriminatory *purpose* required under the Voting Rights Act to justify denying preclearance of annexations. This last step is unwarranted and misconstrues the law of discriminatory purpose.

The discriminatory "*purpose*" which is required by decisions in the voting rights cases is a purpose *related to*

Western Addition. However, the fact remains that the Glasgow Addition is a forty-acre parcel populated by members of a single extended family, albeit a white family. In addition, the record shows that annexation of the Glasgow Addition was approved as a personal favor to the Glasgow family, a reason not foreign to the action of city councils in small towns. While the majority may look askance at municipal decisions based on such factors, I am unprepared to say that the Glasgow decision was made for the "purpose or will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1982). Such effect is in no way demonstrated. Even if the presence of the Glasgow family were to cause a different result, the annexation of the Western Addition should still be approved. Since the Western Addition poses the primary problem here, this opinion is generally directed at the issue raised by its annexation.

voting.⁶ No such relation exists here. *Rogers*, relied on by the majority, involved the maintenance of an at-large system of electing county commissioners that was neutral in origin, but which was being maintained for discriminatory purposes. *Rogers*, 458 U.S. at 626-27. It did not in any way involve the speculation that some act, such as annexation, would eventually result in the denial or abridgment of minority voting strength. *Busbee*, on which the majority also relies, emphasized that discriminatory purpose alone would taint a *voting change*. But *Busbee* involved an actual voting change—the reapportionment of congressional districts involving actual voters. In this case, since the land is vacant, there is no voting change. If there is no concrete voting change at issue, there can be no "*voting change*" taken with a purpose of discriminating, see *Busbee*, 549 F. Supp. at 516 (emphasis added), and thus no violation of the Voting Rights Act, even one based on "purpose" alone.

In its denial of the City's motion for summary judgment, the majority virtually conceded that because of the peculiar facts of Pleasant Grove—the complete absence of blacks in the City and the annexed areas—the annexations could not conceivably have any discriminatory effect. See *City of*

⁶The statute itself indicates that a discriminatory purpose must be related in some way to voting: "Whenever a [jurisdiction covered by the Voting Rights Act] shall enact or seek to administer any voting qualification or prerequisite to voting . . . such [jurisdiction] may institute an action . . . for a declaratory judgment that such qualification [etc.] does not have the purpose . . . of denying or abridging the right to vote on account of race or color . . ." 42 U.S.C. § 1973c (1982). The Supreme Court's decision in *City of Richmond v. United States*, 422 U.S. 358 (1975), which held that annexation decisions may in some instances be subject to review under the preclearance procedures of section 5, is not to the contrary. In *Richmond* the proposed annexation had a direct and substantial bearing on the electoral position of the city's black voters, whereas the proposed annexation in this case will not affect the position of minority voters, either by dilution or exclusion. To include all annexation decisions within the Voting Rights Act would not only hamper municipal decisionmaking, but would detract from the Act's central purpose of assuring that minority voters are free to exercise their constitutionally protected suffrage rights.

Pleasant Grove v. United States, 568 F. Supp. 1455, 1458 (D.D.C. 1983). It defies all reason and common sense to attribute to a governmental entity the purpose to achieve something that cannot conceivably be achieved, particularly when it is so obviously impossible that the voting rights of any black citizen could be adversely affected. Under the majority's approach, the statutory concept of "purpose" is stretched entirely out of proportion, to the point of becoming a mere legal fiction: where a municipality had a history of racial discrimination, the majority seems to say that "purpose" to impair the voting rights of blacks can be *presumed* by an annexation of completely vacant land.

In my view the plaintiffs have demonstrated that the annexations do not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ." Section 5 *supra* (emphasis added). Annexations pose problems slightly different than the ordinary Voting Rights Act case. See *Perkins v. Matthews*, 400 U.S. 379 (1971); *City of Petersburg v. United States*, 354 F. Supp. 1020 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973); *City of Richmond v. United States*, 422 U.S. 358 (1975).

In *City of Petersburg* we were confronted with a substantial dilution of the voting strength of black citizens. Petersburg covered an eight square mile area with a population of 36,103, and it annexed fourteen square miles of adjacent area containing 7,323 persons. Before the annexation Petersburg was 55% black and 45% white; after the annexation Petersburg was 54% white and 46% black. This represented an almost complete reversal in racial proportion—a substantial dilution. We approved the annexation on the grounds that it was conducive to the orderly development of Petersburg but, in order to ameliorate the substantial dilution of the black vote, we imposed the condition that Petersburg switch from an at-large to a ward system of electing the members of the council. The Supreme Court affirmed, 410 U.S. 962, and in *City of Richmond* stated that "*Petersburg* was correctly decided." 422 U.S. at 370.

City of Richmond was followed by *Beer v. United States*, 425 U.S. 130 (1976), which held that "the purpose of § 5 has always been to ensure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. *City of Lockhart v. United States*, 460 U.S. 125 (1983), another Voting Rights Act case from a three-judge court of this district, followed. In *Lockhart*, Chief Judge Spottswood Robinson *tated* in dissent that "the voting strength of Lockhart's minorities, whether or not enhanced, [has not been] diminished one whit." 559 F. Supp. 581, 595 (D.D.C. 1981). In siding with the dissent, the Supreme Court found that "[t]he District Court erred in finding that the continued use of numbered posts has a retrogressive effect on minority voting strength." 460 U.S. at 135. The Court also stated that while "there may have been no improvement in [the] voting strength [of minorities] there has been no retrogression either," and therefore "[a]pplying the standards of *Beer v. United States*" the Court ruled that "the election changes introduced by the 1973 Lockhart City Charter will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." *Id.* at 135-36. The result of the annexations here is practically identical—the annexation of the Western Addition and the Glasgow Addition will not deny or abridge the right to vote on account of race or color of a single individual.

As stated above, however, the majority contends that the annexations in this case constitute a violation of the Voting Rights Act because Pleasant Grove cannot escape its history of numerous acts of racial discrimination extending all the way back to 1940 and beyond. In my view this conclusion is based on highly speculative reasoning and assumptions. Moreover, in my opinion, there is no violation of the Voting Rights Act here, since there is no showing of any retrogression in any respect in the Voting Rights of any minority by the speculative conclusion that such discrimination is "likely" to arise in the future. My

colleagues are indulging in an unreasonable expansion of the Voting Rights Act. This is the first case I can find and none have been called to our attention where objection is raised to annexation of an uninhabited area by a municipality with no black voters. I would therefore approve the annexations, and to alleviate the speculative fears stemming from the historic racial discrimination, I would, as a condition to approving the annexations, enjoin the City of Pleasant Grove from taking any action affecting the Western and Glasgow Additions that would constitute any form of racial discrimination.⁷

It may be in the years ahead that the development of the Western Addition will turn out like the rest of Pleasant Grove and become exclusively or substantially occupied by white citizens. This could be accomplished by completely normal and legal activity. However, if black citizens want to move into the area, they have a constitutionally protected right to do so. If Pleasant Grove takes any discriminatory action based on race or color, it could be redressed under the injunction.

III.

Not only is the government's contention that the Western Addition assuredly will develop all white occupancy essentially speculative, but both annexations may also be justified in terms of the City's fiscal structure. The City points out that *uninhabited* land is open to development, and once developed will create a new market for municipal water and gas, thus producing substantial municipal income. On the other hand, the areas that the majority faults Pleasant Grove for not annexing are substantially *inhabited*, and are thus void prospects for producing potential municipal income from its most beneficial source. Revenue from taxes would merely be a standoff for services rendered.

⁷I also rely on my opinion in *City of Pleasant Grove v. United States*, 568 F. Supp. at 1460-64 (1983).

The majority's decision focuses on, *inter alia*, the economics of the various annexation decisions. The government pointed out that the City's decisions not to annex petitioners and Dolomite (another area inhabited by black citizens) were not preceded by any comprehensive study, and argues that some of the figures subsequently produced by City officials distort the true comparative picture of costs and benefits to Pleasant Grove of annexing the black citizens' areas, as opposed to the Western Addition. The majority largely follows the government in this approach. The City does not contest the absence of any formal economic analysis prior to its annexation decisions, and now concedes that some of the cost figures (those for the fire department and for streets and sanitation) were inaccurate. Plaintiff's Reply Brief at 10.

The record, however, is in truth largely inconclusive on the comparative per capita costs to Pleasant Grove of providing vital services to the respective areas in question. Only as to police services was there any indication that petitioners might be more expensive, and the crime data was incomplete. Nonetheless, there is one very good fiscal reason that Pleasant Grove should prefer annexation of the Western Addition to that of the petitioners—and indeed prefer annexing any undeveloped area to most inhabited developed neighborhoods. The following statement, based on deposition and exhibits, sums up the City's financial situation:

The City of Pleasant Grove derives most of its revenue, not from taxes or the other usual impositions of city governments, but from the sale of water and natural gas. The City, through its Utilities Board, is the distributor of water and natural gas for the area of Alabama which surrounds it. [Mays Affidavit, para. 3]. In the year ending September 30, 1980, Pleasant Grove's "Total revenues and transfers" were \$1,382,193. [Exhibit C to Attachment 3 to the Mays Affidavit]. "Revenues" contributed only \$499,341 of this amount. \$882,852 came from "Transfers from

other funds." Of that \$882,852, \$871,852 was transferred from the Utilities Board of the City of Pleasant Grove. . . . "*Revenues*" provided only 28% of Pleasant Grove's expenditures in the fiscal year ending September 30, 1980.

[H]owever, not all items under "Revenues" could be expected to increase in approximate proportion to population if Pleasant Grove were to annex [petitioners]. . . . [T]he items of revenue which would grow proportionately with annexation total only \$255,404, which is only 14% of "Total expenditures and transfers" for 1980. [Mays Affidavit, para. 4].

Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at 10-11 (emphasis added). According to the deposition of the City's clerk and treasurer, Sarah Mays, the updated figure for revenues that should increase proportionately to population is 23%. Mays Deposition at 12. The government nowhere contests the accuracy of these figures as a basic outline of the municipality's finances.

The City's heavy reliance on *profits* from the distribution of water and natural gas to the surrounding vicinity provides a powerful reason alone for aversion to annexation of already populated areas. Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services*. In effect, the City would be subsidizing such an inhabited area—sharing the profit generated from water and gas distribution sold to new markets in newly annexed areas to pay for the services required in the already developed areas. Undeveloped areas, by contrast, may be expected to pay for the services they require by generating development fees, rather than tapping into the profits the City gains by selling gas and water. The exact levels of costs for services are entirely immaterial in this respect. This ability of Pleasant Grove to raise net revenue from the sale of water and gas alone provides a complete and presumably legitimate explanation for the failure of Pleasant Grove to annex substantially developed areas of

petitioners and Dolomite, and for preferring to annex the completely undeveloped Western Addition and the practically undeveloped Glasgow Addition.

The only areas which could sensibly be annexed are those which remain undeveloped—i.e., still capable of yielding substantial *development fees* (for building permits). According to the affidavit of Mays and exhibits thereto, the City also relies to some significant degree on development fees as a source of revenue. Mays Affidavit, ¶5. In good years, the City's receipts of development fees equal or exceed the total of revenues derived from such sources as sales, income, and property taxes. This suggests that the majority is incorrect in suggesting that if the sales, income, and property taxes of the petitioners' areas were taken into account, it would be fiscally desirable to annex them. See Maj. Op. at 11. If the development of the Western Addition would produce a major potential source of such development fees, the City is thoroughly justified in desiring to annex the area which has that potential. The financial potential of the 1979 annexation is clearly distinguishable from the other situations, and constitutes a persuasive nonracial basis for the City's decision to prefer annexation of the Western Addition.

The majority attempts to undercut the figures submitted by Pleasant Grove, pointing out that no *prior* studies were made. That, however, does not sully the *present* figures. Moreover, Pleasant Grove is a small town of slightly over 7,000 persons, and councilmen in such municipalities are traditionally close to the costs and benefits of a small municipal operation. They may not need the extensive studies of larger cities nor should this court require them. It is just plain common sense that Pleasant Grove would profit more from developing areas where they will have a new market for a *profitable* activity than from annexing areas that are already serviced.

The existence of these persuasive, non-racial purposes for the annexations of the Western and Glasgow Additions negates the inference based solely on speculative assump-

tions from historic discrimination policies. This is especially true in this case, where the finding of a racial purpose by the majority is little more than a presumption of discriminatory purpose inferred from the City's history of racial discrimination. Historic racial discrimination can be a strong indication of discriminatory purpose, *City of Richmond v. United States*, 422 U.S. 358, 362 (1975), in cases where voting rights of actual resident citizens are involved, but this annexation of *vacant* land is not connected to voting and does not deny or abridge the right to vote on account of race or color. For these reasons, I cannot join the majority in their conclusion that the evidence proves that the annexations were arranged to advance a discriminatory purpose that is violative of the Voting Rights Act. On the contrary, the City has provided adequate fiscal reasons for its annexation of the Western and Glasgow Additions, and enjoining the municipality from any racially discriminatory action in the annexed areas will ensure that voting rights, and other civil rights, are not denied in contravention of the Constitution and statutes of the United States.

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED
August 3, 1983

MEMORANDUM ORDER

Before George E. MacKinnon, *Senior Circuit Judge*, Aubrey E. Robinson, Jr., and Harold H. Greene, *District Judges*.

H. GREENE, *District Judge*: The City of Pleasant Grove, a residential community in Jefferson County, Alabama, brought this action under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, seeking a declaratory judgment that the annexation by the city of certain land¹ did not have "the purpose or effect of denying or abridging the right to vote on account of race or color."

¹The complaint initially sought relief only with respect to an area referred to herein as the Western Addition. On October 16, 1982, the Court ordered plaintiff to amend its complaint to include a second annexation, that involving the Glasgow Addition (see *City of Rome v. United States*, 472 F. Supp. 221, 247 (D.D.C. 1979)) and plaintiff has so amended. The Glasgow annexation was accomplished by a city ordinance on May 3, 1971; the Western Addition was annexed by a 1979 Act of the Alabama legislature.

The Attorney General denied preclearance for the annexations because contiguous areas inhabited by blacks which had petitioned for annexation were not annexed by Pleasant Grove.

Presently before the Court is plaintiff's motion for summary judgment.² Plaintiff argues (1) that there is no evidence that the annexations were the product of a purpose to abridge the right of blacks to vote or had such an effect, and (2) that even if a purpose to discriminate could be established, it alone would not sustain the refusal of the Attorney General to clear the annexations.

I

Pleasant Grove has a population of 7,086 people, all of them white.³ Jefferson County as a whole has 671,197 residents, one-third of them black. Other municipalities in west central Jefferson County have substantial black populations,⁴ and there are several unincorporated black communities directly to the south and southeast of Pleasant Grove. Pleasant Grove may thus accurately be described as an all-white enclave in an otherwise racially mixed area of Alabama.

²Plaintiff has moved for summary judgment with respect to the Western Addition and for partial summary judgment with respect to the Glasgow Addition, requesting a finding that annexation of these territories did not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The government has not asked for judgment at this time, although its counsel stated at oral argument that it would be prepared to stipulate that the affidavits and other exhibits filed by the two parties constitute the full trial record. Plaintiff has not taken a position on this suggestion.

³Thirty-two of the inhabitants are black, but they all live in a nursing home; they do not vote; and their residence in the city was apparently unknown even to the city officials at the time of the latest annexation. Because of the peculiar status of these 32 blacks, both parties have treated the City of Pleasant Grove as being all-white, and so will the Court.

⁴Birmingham's population is over 55 percent black, Bessemer 51 percent, Hueytown 9.6 percent, and Fairfield 52 percent black.

The basic issue here is whether the Voting Rights Act forbids the annexation by Pleasant Grove of areas inhabited or likely to be hereafter inhabited by whites at a time when Pleasant Grove is refusing to annex contiguous areas which are inhabited by blacks. Resolution of this issue demands examination of two subsidiary questions—first, can an intent to discriminate be attributed to Pleasant Grove on the present record, and second, assuming that such an intent exists, is Pleasant Grove prohibited from proceeding with its annexations in the absence of any allegation by the government that the voting power of blacks will be impaired or diluted?

II

The government's evidence, which, for purposes of the motions must be regarded as true,⁵ shows an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life.

As early as in the 1940s, the Pleasant Grove city council acted to prevent the construction of a "colored housing project" within the city and directed the city attorney to draft a zoning ordinance designed to "restrict colored property." The city has thereafter consistently maintained a dual housing market through advertising and marketing directed exclusively to white buyers. In 1978, the city council adopted an exclusionary zoning ordinance which was found by a federal court to have a racially restrictive effect.⁶

Pleasant Grove's annexation policy followed a similar pattern. For example, the city refused to annex the site on which the "black" Woodard School was located in an attempt to avoid school desegregation orders issued by a

⁵The government has submitted affidavits, excerpts from depositions, answers to interrogatories, and the like, to attest to all the facts alleged in its briefs.

⁶*Wheeler v. City of Pleasant Grove*, C.A. No. 78-G-1150-S (N.D. Ala. 1979).

federal court. See p. 5 *infra*. However, shortly after that refusal, the city annexed the Glasgow Addition which is located several miles outside the city limits past a black neighborhood which was not annexed. The city also declined at various times to annex two parcels of land⁷ because of their location adjacent to black areas and the possibility that these areas might, in turn, press for annexation. In 1979, Pleasant Grove began its effort to annex the Western Addition which, together with the Glasgow Addition, is now directly before the Court in this action.⁸ While the Western Addition annexation was taking its course, two black areas (Pleasant Grove Highlands and the Dolomite area) petitioned for annexation. Both were rejected.⁹

Pleasant Grove's discriminatory policies have not been confined to housing, annexations, and zoning.¹⁰

Prior to 1969, Pleasant Grove maintained a rigidly segregated school system: black children living in close proximity to Pleasant Grove were bused elsewhere. When a federal court mandated an end to this system on August 4, 1969,¹¹ the city council voted to secede from the county

⁷Known as the Kohler and the Westminster areas.

⁸While the Western Addition is undeveloped, its location and the city's plans indicate that it is likely to be developed for use by white persons only.

⁹There is a dispute between the parties as to the relative economic benefits and detriments to Pleasant Grove as between the white areas and the black areas. These disputes cannot be resolved on a motion for summary judgment. Suffice it to say that, on the record as it presently stands, there are at a minimum genuine issues of material fact on these matters. The burden of proof is, of course, on Pleasant Grove. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia v. United States*, 441 U.S. 526, 538 (1973).

¹⁰Evidence of discrimination with respect to matters other than annexation or voting is relevant on the issue of purpose in Voting Rights Act cases. *Rogers v. Lodge*, 73 L. ed. 1012, 1021, 1023 (1982); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982) (three-judge court).

¹¹*Stout v. Jefferson County Board of Education*, C.A. No. 65-396 (N.D. Ala. 1969).

school system on the very evening of the day the court order was issued.¹² Moreover, although the County is one-third black, Pleasant Grove itself has never had a black employee.¹³

From all these facts, a court could appropriately draw the inference that the City of Pleasant Grove had and has the purpose to discriminate against blacks with respect to voting as with respect to other subjects. To be sure, the incidents of discrimination do not directly involve voting, nor could they, since there were and are no blacks eligible to vote in Pleasant Grove: all blacks have simply been kept out. Nevertheless, as the Supreme Court has said, the "historical background of [a] decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). For that reason, proof of discrimination in a variety of fields may be used as proof in an action charging discrimination in voting. See note 10 *supra*.

The present record, if unrebutted, would warrant a finding that the City of Pleasant Grove had the purpose, in its annexation decisions, of "denying or abridging the right to vote on account of race. . . ." 42 U.S.C. § 1973c. The next question to be determined is whether such a finding

¹²In subsequent litigation, the Court of Appeals for the Fifth Circuit held that the Pleasant Grove school system was not to be recognized if it has the effect of thwarting the implementation of a unitary school system. *Stout v. Jefferson County Board of Education*, 448 F.2d 403 (5th Cir. 1971). When, on remand, the District Court required Pleasant Grove to provide transportation to the black children assigned to its schools, the mayor announced, with the approval of the city council, that Pleasant Grove would not do so. Ultimately, the court abolished the Pleasant Grove school system and transferred control of the schools back to Jefferson County. *Stout v. Jefferson County Board of Education*, 466 F.2d 1213 (5th Cir. 1972), *cert. denied*, 411 U.S. 930 (1973).

¹³It may also be noted that the city council has authorized the formation of a chapter of the White Citizens Council; thanked Governor George Wallace for his fight against integration; and condemned the Birmingham Bar Association for its expression of moral support to District Judge Pointer for his efforts in *Stout*.

would entitle the United States to judgment in its favor after a trial and, thus, would defeat plaintiff's motions for summary judgment.

III

Pleasant Grove contends most vigorously that, especially in an annexation case, proof of a discriminatory purpose is insufficient; that there must be proof of a discriminatory effect. It further reasons that, since there are no black voters (or persons even arguably eligible to vote) in the city, there could be no proof of a discriminatory effect, and the government's claims must therefore be rejected.

The basis for these arguments is as follows. While according to *City of Richmond v. United States*, 422 U.S. 358 (1975), annexation constitutes a change in a voting practice or procedure, under that decision an annexation violates the Voting Rights Act if it reduces the proportion of voters of a particular race in the affected locality (or if the minority race has been denied the opportunity to obtain representation reasonably equivalent to its political strength in the enlarged community). It follows, according to plaintiff, that since there are no blacks eligible to vote in Pleasant Grove, the government cannot meet the *City of Richmond* standard. This conclusion is said to be buttressed by *Beer v. United States*, 425 U.S. 130 (1976) which held that the Voting Rights Act does not require preclearance for a *failure* to change a voting practice or procedure (as distinguished from an *active alteration* of such a practice or procedure). Again, since, with regard to the black areas at issue here, Pleasant Grove has simply failed to annex them, the *Beer* decision, so the reasoning goes, constitutes a complete defense.

This argument is not persuasive. The *City of Richmond* case and other, similar annexation decisions discuss the applicable standard in terms of the effect of the annexation on black voters in the annexing community because in those cases there happened to be black voters in that community and hence the annexations did have the effect

of reducing their voting power. These cases do not discuss, and hence they do not reject, the application of a purpose test, particularly not in the context of an annexation where, as here, there are no black voters in the annexing municipality.

However, a number of recent decisions make it clear that a discriminatory effect (on blacks already living in a community) is not the only yardstick by which discrimination in violation of the Voting Rights Act may be measured, and that annexation decisions made with a discriminatory purpose—regardless of effect—also constitute violations of the Fifteenth Amendment and the Voting Rights Act.

In *City of Port Arthur, Texas v. United States*, 103 S.Ct. 530, 535 (Dec. 13, 1982), the Court held that

... even if [a particular] electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid *if adopted for racially-discriminatory purposes* ... (emphasis added).¹⁴

¹⁴The dissent charges us with misstating the Supreme Court's ruling in that case by failing to quote an entire paragraph from the opinion. That complaint would have validity if Judge MacKinnon were correct in his assumption that the Supreme Court meant to limit its condemnation of discriminatory purposes to situations where existing minority voting rights were being diluted (as distinguished from those where such an effect does not, indeed cannot, exist because blacks are completely denied the right to vote by being kept out of the particular voting area). But that assumption is clearly not correct, for it does not account for the Supreme Court's explicit reference to discriminatory purpose both in *City of Port Arthur* and in *Lockhart* (where under Judge MacKinnon's view reliance on discriminatory effect would have sufficed) or to the equally explicit reference in *Perkins v. Matthews* to revisions in municipal boundaries which keep blacks out. Viewed in that light, the portion of the *City of Port Arthur* opinion quoted by our dissenting colleague is nothing more than one illustration of the general rule that changes in voting practices which have a discriminatory purpose violate the Voting Rights Act, and it is therefore irrelevant to our holding.

The recent case of *Lockhart v. United States*, 103 S.Ct. 998, decided February 23, 1983, further supports this conclusion. The Court there referred with approval to the district court's recognition "that the City must prove both the absence of discriminatory effect and discriminatory purpose . . .," *id.* at 1001, and that "[i]n view of its decision on discriminatory effect, it was unnecessary for the District Court to reach the issue of discriminatory purpose."¹⁵ *Id.* at n.4.

Indeed, the Supreme Court has described as discriminatory the very fact situation presented by this case. In *Perkins v. Matthews*, 400 U.S. 379, 388 (1971), the Court said,

Clearly, revision of boundary lines has an effect on voting in two ways: (1) *by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not*; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation. . . . (emphasis added).

The second category mentioned by the *Perkins* court is that involved in *City of Richmond*, *supra*, and similar cases; the first category is that presented by this case. See also, *Busbee v. Smith*, *supra*, 549 F. Supp. at 515-16; and *Allen v. State Board of Elections*, 393 U.S. 544, 567-68 (1969).

The remark of the Fifth Circuit in *United States v. Hinds Country School Board*, 417 F.2d 852, 858 (5th Cir. 1969) that "nothing is as emphatic as zero" is particularly apt here. It would be incongruous if the City of Pleasant Grove, having succeeded in keeping all blacks out, could now successfully defend on the ground that there are no blacks in the city whose right to vote would be diluted by

¹⁵To be sure, the Supreme Court there held that the "effect" prong of the Act is not violated by changes in voting laws which are not retrogressive in effect. That holding, of course, is irrelevant to the "purpose" prong.

the annexation of white, but not black, subdivisions. This Court is not prepared to endorse such an anomalous result.¹⁶

¹⁶Judge MacKinnon suggests that it follows from our holding in this case that the Voting Rights Act would be violated by the grant of a building permit for condominiums priced at a range beyond the reach of blacks. Dissent at 21. This would be correct, however, only if a municipality's grant of a building permit were considered a change of voting practices or procedures under the Voting Rights Act. While the Supreme Court has repeatedly held that changing boundary lines by annexations constitutes a change of a "standard, practice, or procedure with respect to voting" under the Voting Rights Act, such that the preclearance requirements of section 5 of the Act must be satisfied, see, e.g., *Perkins v. Matthews*, *supra*, 400 U.S. at 388, we are unaware of any decision holding that the grant of a single building permit likewise triggers the preclearance requirements of the Act. Because of the obvious differences between changing boundary lines and granting building permits, we agree with the dissent that it is unlikely that Congress intended the Voting Rights Act to apply to the latter. However, with respect to Judge MacKinnon's broader point which the building permit example was presumably intended to prove—that neither discriminatory purpose nor an effect on individuals not currently in the particular community are enough—it is, in our view, mistaken. If it could be proved that the decision of a municipality with respect to building permits had as its purpose to keep blacks out of the particular neighborhood, its actions would violate the Fourteenth Amendment. See, e.g., *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) which held that the Fourteenth Amendment was violated by the racially motivated denial of building permit; and *Kennedy Park Homes Assoc., Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1971) where the court, in an opinion by Justice Clark, sustained a finding of violation of the Fourteenth Amendment where officials had rezoned property that had been selected for a housing project and declared a moratorium on new subdivisions in order to deny housing to minority families. See also, *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-68 (1979). Similarly, the Fifteenth Amendment is violated by a redefinition of city boundaries which is undertaken for the purpose of depriving blacks of the benefits of residence in a municipality, including, the right to vote in municipal elections. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); see also, *Mobile v. Bolden*, 446 U.S. 55 (1979) which, like *Arlington Heights*, *supra*, emphasized the importance of discriminatory purpose in the context of actions designed to invoke the protection of the Fourteenth or Fifteenth Amendment. On this motion for summary judgment, we must, of course, assume that the plaintiff will be able to prove discriminatory purpose, and it is clear on the basis

It is also noteworthy that the Attorney General, who administers the Voting Rights Act in the first instance, has consistently objected to annexations which were the product of racially selective policies. See Supplemental Memorandum of the United States, pp. 2-4 and attachments. The Attorney General's interpretation of the requirements of the Voting Rights Act is, of course, entitled to considerable deference. See *Perkins v. Matthews*, *supra*, 400 U.S. at 390-94; *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 134 (1978). The Attorney General's objection letters were submitted to and made a part of the record of the Congress¹⁷ at various times, including at the time when Congress recently considered the extension of the Voting Rights Act. See H.R. Rep. No. 97-227, 97th Cong. 2d Sess., p. 13 (1982).¹⁸

It is thus clear from the precedents (1) that in the context of annexations, the Voting Rights Act applies if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect and (2) that the failure to annex is a violation of the Act provided discriminatory purpose is shown.

This does not mean, of course, that Pleasant Grove or any other community would be required to annex contiguous areas merely because such areas may be inhabited by blacks. But it does mean that a community may not annex adjacent white areas while applying a wholly dif-

of the precedent cited that, upon such proof, a violation of the Fifteenth Amendment would be established. There is no basis for an interpretation of the Voting Rights Act which would provide fewer protections than those provided by the Fifteenth Amendment, for that Act was enacted pursuant to the power vested in Congress by section 2 of the Amendment to provide *additional* protections in that vital area. See *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27, 337 (1966).

¹⁷Interestingly, a case summary of the Pleasant Grove litigation was included in one of these reports.

¹⁸For the significance of the reenactment of the statute under conditions where Congress voices its approval of administrative interpretation, see *United States v. Sheffield Board of Commissioners*, *supra*, 423 U.S. at 134.

ferent standard to black areas and failing to annex them based on that discriminatory standard. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). If a community subject to the Voting Rights Act cannot demonstrate that it is not engaged in such discrimination, the Attorney General and the Court will not grant clearance for the annexation of the white areas.

For the reasons stated, it is this 3rd of August, 1983,

ORDERED That plaintiff's motion for summary judgment and its motion for partial summary judgment be and they are hereby denied.

MacKINNON, *Senior Circuit Judge*, (dissenting): Neither annexation here *changes* the voting rights of a single member of any minority group. Therefore, because there is no change whatsoever in the voting rights of any member of any minority, I cannot agree with the majority that the two annexations at issue in this case are "violation[s] of the [Voting Rights] Act provided discriminatory purpose is shown." Maj. Op. at 13.

The majority opinion refers to three Supreme Court decisions holding certain annexations subject to preclearance under section 5 of the Act, *City of Port Arthur v. United States*, 103 S.Ct. 530 (1982); *City of Richmond v. United States*, 422 U.S. 358 (1975); *Perkins v. Matthews*, 400 U.S. 379 (1971), but in each of those cases the annexations clearly *changed existing voting rights of minorities*. Typical of these is *City of Richmond*, where the Court held:

Section 5 forbids *voting changes* taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is 'to despoil colored citizens, and only colored citizens, of their *theretofore enjoyed voting rights*.' . . . An annexation proved to be of this kind [a change in the voting rights of some minority citizens] and not proved to have a justifiable basis is forbidden by [section] 5 whatever its actual effect may have been or may be.

City of Richmond v. United States, *supra*, 422 U.S. at 378-79 (quoting *Gomillion v. Lightfoot*, 364 U.S. 359, 347 (1960)) (emphasis added). Thus the principles these cases announce are not applicable to this case where there is no change in the not applicable to this case where there is no change [sic] in the existing voting rights of any single minority individual.

The majority relies upon the following *partial* quotation from *City of Port Arthur*:

In the *City of Port Arthur, Texas v. United States*, 103 S.Ct. 530, 535 (Dec. 13, 1982), the court held that

... even if [a practical] electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid *if adopted for racially-discriminatory purposes* ... (emphasis added).

Maj. Op. at 9. In failing to quote the complete sentence the majority grossly misstates the Supreme Court's ruling and asserts that an annexation made with a discriminatory purpose—regardless of effect—violates the Voting Rights Act. *Id.* at 8-9.

The complete quotation from the Supreme Court opinion in *City of Port Arthur v. United States*, *supra*, 103 S.Ct. at 535-36 (emphasis added), reads as follows:

[E]ven if the 4-2-3 electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid if adopted for racially discriminatory purposes, *i.e.*, *if the majority-vote requirement in the two at-large districts had been imposed for the purpose of excluding blacks from any realistic opportunity to represent those districts or to exercise any influence on council members elected to those positions.*

A fair reading of this sentence does *not* support the asserted position of my colleagues. What the Court is truly

saying is that an electoral scheme will be denied preclearance, even if minority votes are properly represented in the apportionment, *if it is continued with an electoral voting scheme that includes a discriminatory majority voting requirement in at-large districts imposed for the purpose of excluding minorities from any realistic opportunity to represent those districts.* The incomplete quotation from *City of Port Arthur* thus does not fairly represent the factual basis of the decision or the ruling expressed by the Supreme Court.

Perkins v. Matthews, 400 U.S. 379 (1971), relied on by the majority, is not contrary. There the annexation increased the number of eligible voters and diluted the weight of minority votes. Neither fact exists here. The Court noted that § 5 of the Voting Rights Act "was designed to cover *changes* having a potential for racial discrimination in voting, and such potential inheres in a *change in the composition of the electorate affected by an annexation.*" *Id.* at 388-89 (emphasis added). Clearly the Court was concerned that "by including certain [actual] voters within the city and leaving others outside" an annexation could serve as a means for a community to discriminate against minority voters *in the community* by changing the composition of the electorate to their detriment. *Id.* at 382 n.4, 388-90. See Maj. Op. at 8-9.

The majority also contends that *City of Lockhart v. United States*, 103 S.Ct. 998 (1983) supports its conclusion, but in that case the Supreme Court reversed a three-judge district court panel and "conclude[d] that the *election changes* introduced by the 1973 Lockhart City Charter will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group." *Id.* at 1004. In so holding, the Court adopted the position of Chief Judge Spottswood Robinson of the United States Court of Appeals for the District of Columbia Circuit, who dissented in *Lockhart* because "the voting strength of Lockhart's minorities, whether or not enhanced, would not be diminished one whit." *City of Lockhart v. United States*, 559 F. Supp. 581, 595 (D.C.C. 1981)

(S. Robinson, C.J., dissenting) (quoted in *City of Lockhart v. United States*, *supra*, 103 S.Ct. at 1004). As the majority recognizes, the Court did not consider the "purpose" prong of section 5 in *Lockhart* because the district court panel had not reached that issue. See *City of Lockhart v. United States*, *supra*, 103 S.Ct. at 1001 & n.4; Maj. Op. at 9. However, unlike the other cases relied upon by my colleagues, *Lockhart* involved a fact situation where the existing voting rights of minorities were being altered. Judicial decisions such as *Lockhart* which involve factual situations where minority voting rights are changed are simply not applicable to situations where there is no change whatsoever in the existing voting rights of minorities and where any changes which might take place in the future are speculative.

The two annexations at issue in this case simply have not changed the voting rights of minorities. The larger, 1979 annexation involves vacant land and does not change the voting rights of a single person, much less minorities. The smaller, 1971 annexation incorporated one family of approximately fourteen whites into the City. While this annexation results in at least a *de minimus* change in voting rights in the City of Pleasant Grove, it does not change any existing minority voting rights because there are no minority voters in the City or in any of the annexed territory.¹ Since the annexations at issue do not change any existing minority voting rights and the Voting Rights Act only applies when there is some "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), it is my view that the two annexations, one of which is inhabited by one non-minority

¹I find it significant that the Justice Department failed to object to several annexations of the City of Bessemer, Alabama, because they involved "areas that are not populated or areas the population of which have a most a *de minimus* effect on minority voting strength." Defendant's Supplemental Memorandum, Attachment 6, at 2-3. As the majority recognizes, the Attorney General's interpretation of the Voting Rights Act is "entitled to considerable deference." Maj. Op. at 9.

family, cannot constitute a violation of the Voting Rights Act, regardless of the motives of the City. Accordingly, summary judgment is appropriate.

I do not wish to suggest that the motives of the City of Pleasant Grove are pure. I agree with the majority that, from the facts in the record, "a court could appropriately draw the inference that the City of Pleasant Grove had and has the purpose to discriminate against blacks with respect to voting as [well as] with respect to other subjects." Maj. Op. at 6. There may, in fact, be actionable constitutional violations occurring in the City. See *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).² Such violations are not issues before us.³ The purpose of § 5 is to prevent communities from avoiding the Act's requirements—elimination of literacy tests and other like voting qualifications—by simply enacting slightly different voting

²Of course, *Gomillion* involved the elimination of practically all Negro voters from the elective franchise in the City of Tuskegee, Alabama. As the Supreme Court remarked:

The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident.

Gomillion v. Lightfoot, *supra*, 364 U.S. at 341. *Gomillion*, involving as it does the "unequivocal withdrawal of the vote solely from colored citizens," is a far cry from the annexations at issue here. *Id.* at 346.

³I cannot agree with the majority's suggestion that the Voting Rights Act incorporates all of the protections of the Fifteenth Amendment, as well as providing "additional protections in that vital area." Maj. Op. at 11-12 n.16 (emphasis in original). The Act does provide some additional protections for minority voters; section 5 does so by placing the burden on municipalities to demonstrate, prior to implementation of changes in the existing voting rights of minorities, that such changes do "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." 42 U.S.C. § 1973(c) (1976). Nothing in the Voting Rights Act, however, imposes the burden on municipalities to disprove allegations of violations of the Fourteenth and Fifteenth Amendments of the sort involved in the cases cited by the majority. See Maj. Op. at 11-12 n.16.

qualifications having the same discriminatory impact. *Allen v. State Board of Elections*, 344 U.S. 544, 548-50 (1969). Where, as here, an annexation in no way changes existing voting rights of minorities, or even directly involves a single identifiable member of any minority group, the Voting Rights Act is not implicated.

Support for summary judgment in this case is also found in the language of section 5 itself; the statutory scheme does *not* contemplate its application to annexation of vacant property. Section 5 provides:

Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group], and *unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure*

42 U.S.C. § 1973(c) (1976) (emphasis added). The italicized language setting forth the enforcement provision indicate that Congress only intended the Act to apply where individual minority voters were actually involved.

The question in this action is whether the annexation of vacant land to the west and north of the City of Pleasant Grove is a "qualification, prerequisite, standard, practice or procedure" having the purpose or effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group. The mere

annexation of property upon which no voters reside cannot be termed "a qualification, prerequisite, standard, practice, or procedure with respect to voting" because the preclearance and enforcement requirement of § 5 contemplates situations where at least some minority individuals' voting rights are changed by the "qualification, prerequisite, standard, practice, or procedure" at issue. The language of the statute thus implicitly indicates that Congress did not intend section 5 to apply to annexations having no impact on the voting rights of minorities, such as the Western and Glasgow additions to the City of Pleasant Grove.

If the majority's interpretation of the Act were correct, the granting of a building permit by the City of Pleasant Grove for condominiums estimated to sell for \$125,000 each could be denied preclearance under section 5 of the Voting Rights Act if non-resident minorities demonstrated that they could not afford to purchase the condominiums. In my view Congress did not intend section 5 to be given such an expanded construction; the intent expressed in the language of section 5 does not support such an interpretation.

I therefore find it necessary to dissent. The majority is attempting to extend the Act to a factual situation to which it was never intended to apply.

APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FILED
October 25, 1985

ORDER

Upon consideration of the evidentiary materials submitted by the parties, the briefs, the arguments advanced at the hearing on June 25, 1984, and the entire record herein, it is this 25th day of October, 1985, in accordance with an Opinion issued contemporaneously herewith

ORDERED that the Court denies plaintiff's request for a declaratory order that the annexations of (1) 40 acres of land inhabited by 14 members of the Glasgow family and known as the "Glasgow Addition" which was adopted by the City of Pleasant Grove on May 3, 1971 pursuant to Ordinance No. 161, and (2) 450 acres of uninhabited land known as the "Western Addition" which was approved by the Legislature of the State of Alabama by Act No. 79-419, and signed by the Governor on July 17, 1979, did not have the purpose of denying or abridging the right to vote of any person on account of race or color in violation of section 5 of the Voting Rights Act of 1965, and

that plaintiff may enforce the aforesaid annexations; and it is

DECLARED that such annexations had the purpose of denying or abridging the right to vote on account of race or color in violation of the Act; and it is further

ORDERED that denial of plaintiff's request is without prejudice to a renewal of the request for preclearance in the event that the City of Pleasant Grove devises and implements a racially non-discriminatory annexation policy.

HAROLD H. GREENE

United States District Judge

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Filed

December 19, 1985

NOTICE OF APPEAL

Notice is hereby given that the City of Pleasant Grove, plaintiff above-named, hereby appeals to the Supreme Court of the United States from this Honorable Court's decision of October 25, 1985. This appeal is taken under the provisions of 42 U.S.C. §1973c.

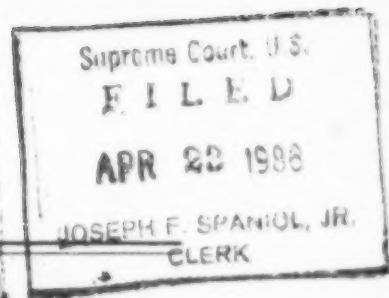
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No. 85-1244



In the Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF PLEASANT GROVE, APPELLANT

v.

UNITED STATES OF AMERICA

*ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the annexation by an all-white municipality for racially discriminatory purposes of a vacant area and an area inhabited exclusively by whites violates Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

2. Whether the district court's finding that the annexations at issue were motivated by racially discriminatory purposes is clearly erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1244

CITY OF PLEASANT GROVE, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM
 THE UNITED STATES DISTRICT COURT FOR
 THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States moves for affirmance of the judgment of the district court in this case.

OPINIONS BELOW

The opinion of the district court issued October 25, 1985, denying appellant's claim for declaratory relief (J.S. App. 1a-26a), is reported at 623 F. Supp. 782. The opinion of the district court issued August 3, 1983, denying appellant's motions for summary judgment (J.S. App. 1b-17b), is reported at 568 F. Supp. 1455.

JURISDICTION

The three-judge district court entered its judgment on October 25, 1985 (J.S. App. 1a-26a). Appellant filed its notice of appeal on December 19, 1985. The jurisdictional statement was filed on January 23, 1986. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.

(1)

STATEMENT

1. The City of Pleasant Grove is a suburb of Birmingham, Alabama, with an all-white population of approximately 7000 (J.S. App. 2b).¹ It lies in Jefferson County, which has a population of 671,197, one-third of whom are black (*ibid.*).

The city has approved four annexations: a parcel to the southeast of the city in 1945; sections to the north, south, and west of the city in 1967; the Glasgow Addition in 1971; and the Western Addition in 1979. None of these annexations brought any black inhabitants into the city. The city also actively pursued annexation of two other all-white areas—Sylvan Springs and West Grove—in 1969, but the United States Steel Corporation, as an intervening property owner, blocked that action. J.S. App. 3a & n.2.

The city has rejected five annexation requests: the site of the predominantly black Woodward School, which the city refused to annex in 1971 in order to avoid federal court desegregation orders (J.S. App. 3a n.3); the Pleasant Grove Highlands, an all-black area the city refused to annex in 1979 (*id.* at 3a); the Dolomite area, another all-black area the city refused to annex in 1979 (*id.* at 4a); and the Kohler and Westminster sections, which were all white, but were rejected because their annexations might produce a “mushroom effect” leading to the annexation of adjoining black areas (*id.* at 4a n.4).

This litigation was provoked by the annexation of the Western Addition in 1979. In February 1979, the city council voted to annex 430 acres of uninhabited property lying to the west (the Western Addition) (J.S. App. 3a). The

¹The city’s population during the relevant period included 32 black residents of Pleasant Grove nursing homes who, while presumably eligible to vote, were unregistered (J.S. App. 13a). The court treated the city as all white despite the nursing home residents (*id.* at 2b n.3).

annexation was approved by the Alabama legislature and signed into law by the governor on July 17, 1979 (*id.* at 14a n.1). City plans indicate this land will likely be used exclusively for white residential development (*id.* at 4a n.5).

While the annexation of the Western Addition was under consideration, black residents of Pleasant Grove Highlands and the Dolomite area petitioned the city for annexation. The city never formally acted on these petitions and, thus, effectively rejected them. J.S. App. 4b.

In 1980, the Attorney General refused to preclear the Western Addition annexation pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, on the ground that the city had failed to satisfy its burden of demonstrating that the annexation was not motivated, at least in part, by a racially discriminatory purpose (J.S. App. 10b-11b).

The city commenced this action pursuant to Section 5 of the Voting Rights Act in the United States District Court for the District of Columbia, seeking a declaratory judgment that the annexation of the Western Addition did not have the purpose or effect of denying or abridging the right to vote (J.S. App. 1b). During discovery the city revealed that it had never sought preclearance of the 1971 Glasgow Addition, which was occupied by 14 white citizens (*id.* at 17a-18a n.5), and the district court ordered the city to seek preclearance of that annexation as well (*id.* at 1b n.1) so that the cumulative effect of the annexations could be considered. See *City of Rome v. United States*, 472 F. Supp. 221, 247 (D.D.C. 1979), *aff’d*, 446 U.S. 156, 187 (1980).

2. In August 1983, the court denied the city’s motion for summary judgment. After noting “an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life” (J.S. App. 3b), including the areas of housing, employment, and education (*id.* at 4b-5b), the court found that the city’s annexation policy followed a similar pattern

(*id.* at 3b). Based on this pervasive history of discrimination and the city's persistent refusal to incorporate any black voters, while acting favorably on annexation requests from white voters, the court held that, for purposes of the summary judgment motion, the record justified a finding that the city made its annexation decisions on a racially discriminatory basis (J.S. App. 5b).

The court concluded that the absence of black voters from Pleasant Grove did not preclude a finding that the annexations violated Section 5. The court held that the city could violate Section 5 by acting with a discriminatory purpose, regardless of the absence of a dilutive effect (J.S. App. 7b). The court noted that the city, through its annexation policy, had decided on the basis of race who should vote in municipal elections and who should not (*id.* at 8b). That conclusion was supported by the Attorney General's consistent objection to racially selective annexation policies (*id.* at 10b).

Judge MacKinnon dissented on the ground that the two annexations under consideration did not change the existing voting rights of any member of a minority group since the city did not contain any black voters. He concluded that a purpose to discriminate was insufficient to violate Section 5 absent any possible effect on minority voting strength within the municipality (J.S. App. 11b-17b).

3. On October 25, 1985, the court decided the case on the merits. It held that Pleasant Grove had failed to sustain its burden of proving that the annexation policy did not have a racially discriminatory purpose in violation of Section 5. The court found that the location of the Western Addition and the city's plans for its development would likely result in an all-white area (J.S. App. 4a n.5). The court rejected the city's contention that its decision to annex the Western and

Glasgow areas, while simultaneously rejecting the application of the black Highlands area, was based on economic self-interest and not race. The court concluded that the city's economic argument was unsupported by the record and was a pretext for incorporating the white areas while excluding the black areas. *Id.* at 4a-10a. Moreover, the court's finding of racial purpose was supported by the city's history of "an astonishing hostility to the presence and rights of black Americans" (*id.* at 12a).

Judge MacKinnon again dissented. First, he took exception to the majority's finding that the uninhabited Western Addition would be occupied exclusively by whites (J.S. App. 16a-17a).² Judge MacKinnon further stated that while an impermissible purpose may violate Section 5, it must be a purpose related to voting and since the Western Addition was uninhabited, there could be no voting-related purpose (J.S. App. 18a-22a). Judge MacKinnon also found the city's annexation policy justified on financial grounds (*id.* at 22a-26a).

ARGUMENT

The city raises two main contentions in this appeal. First, it argues that its annexation of an all-white area and a vacant area cannot violate Section 5 since the city contains no black voters who can be harmed by the annexations (J.S. 11-16). It further challenges as clearly erroneous the district court's finding that the city's annexation practices were motivated by racial discrimination rather than economics (J.S. 16-17). Neither contention has merit.

²Judge MacKinnon acknowledged that the Glasgow area was inhabited exclusively by 14 members of a single white family, but concluded that the city had annexed the 40 acre parcel as a favor to the family and not for racial reasons. He stated further that, regardless of the disposition of the Glasgow Addition, the annexation of the Western Addition should be approved since it involved completely uninhabited land (Pet. App. 17a n.5).

The decisions of this Court and the established practice of the Department of Justice fully support a refusal to preclear boundary lines that have been redrawn with the purpose of extending the municipal franchise to whites while excluding black voters. Moreover, the city has failed to demonstrate a sufficient economic justification for its annexation policy to render clearly erroneous the court's finding that the city was motivated by racial animus toward blacks. Because the district court was correct in denying declaratory relief and the case does not present any novel issue, this Court should summarily affirm the judgment of the district court.

1. Pleasant Grove contends (J.S. 11-12) that its practice of annexing all-white or vacant areas while refusing to annex areas containing black voters cannot violate Section 5 of the Voting Rights Act so long as it successfully secures its boundaries against intrusion by any black residents. The city contends that by remaining all white it can avoid any prospect of dilution of black votes that this Court has found retrogressive and offensive to Section 5.

This Court has repeatedly emphasized, however, that a voting change motivated by racial animus, even absent a retrogressive effect, violates Section 5. *City of Rome v. United States*, 446 U.S. 156, 172 (1980); *Beer v. United States*, 425 U.S. 130, 141 (1976); *Perkins v. Matthews*, 400 U.S. 379, 387-388 (1971). In *City of Richmond v. United States*, 422 U.S. 358, 378 (1975), this Court explained why an annexation that had been found not to have a discriminatory effect had to be remanded to the district court for examination of its purpose:

The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids

voting changes taken with the purpose of denying the vote on the grounds of race or color.

Because official acts taken with a discriminatory purpose constitute "gross racial slurs" (*ibid.*), they cannot be tolerated under Section 5, regardless of whether they produce a retrogressive effect on minority voters. Thus, Pleasant Grove cannot successfully contend that its annexation of white and uninhabited areas does not violate Section 5 simply because there are currently no black voters in the city whose votes will be diluted. If, as the district court found, the purpose behind its annexation policy was, for purely racial reasons, to deny to future black voters full participation in the electoral process on equal terms with future white voters, the annexations violate Section 5.³

The Attorney General's interpretation of Section 5 fully supports the district court. Since at least 1972, the Attorney General has consistently objected to selective annexations motivated by racially discriminatory purposes, both of white or vacant areas, regardless of whether the annexation diluted the votes of minority voters remaining in the annexing jurisdiction.⁴

³Because the district court found that the city's purpose was to violate the rights of minority voters, the question whether there will be retrogression of minority voting rights sufficient to violate the Act is irrelevant. Moreover, given the city's racially discriminatory purpose in making the Western and Glasgow annexations, it is irrelevant whether the city's failure to annex other areas with black voters constitutes a change in voting practice or procedure under Section 5 (see J.S. 13-16).

⁴The United States submitted to the district court a list of objections interposed by the Attorney General to annexations on the ground that they reflected racially selective annexation policies. U.S. Supp. Mem. (filed Oct. 15, 1982). This list included objections to annexations by: Lake Providence, Louisiana (December 1, 1972); McComb, Mississippi (May 30, 1973, withdrawn October 21, 1974); McClellanville, South Carolina (May 6, 1974); Grenada, Mississippi (February 5, 1975);

2. A trial court's findings of discriminatory intent are factual findings which are subject to appellate review under the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P. *Anderson v. Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-9. See *Rogers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290 (1982); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534-537 (1979).

Because of the deference due the trial court under the clearly erroneous standard, an appellate court may reverse a factual finding only if the evidence leaves it with the "definite and firm conviction that a mistake has been committed." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, slip op. 8.

The evidence in this case demonstrated that a racially discriminatory purpose was behind the contested annexations. Indeed, abundant evidence supports the court's conclusion. First, as the district court chronicled, Pleasant

Lumberton City School District, Lumberton, North Carolina (June 2, 1975); Bessemer, Alabama (September 12, 1975); Statesboro, Georgia (December 10, 1979); Pleasant Grove, Alabama (February 1, 1980).

The Attorney General does not interpret Section 5 as requiring all jurisdictions wishing to annex white or vacant areas to annex black areas as well. The great majority of submitted annexations involve white residential areas, but between 1965 and 1981, the Attorney General objected to only 245 of the 8,786 annexations submitted for Section 5 preclearance (U.S. Supp. Memo at 2 n.1 (filed Oct. 15, 1982)). The Attorney General will ordinarily object only if an annexation will dilute the votes of black residents of the submitting jurisdiction or, as in this case, the annexation will lead to voting changes and is motivated by a racially discriminatory purpose.

Grove has an undisputed history of official acts of racial discrimination. These included enactment of an exclusionary zoning ordinance that was struck down by a federal court because of its racially discriminatory effect in *Wheeler v. Pleasant Grove*, C.A. No. 78-G-1150-S (N.D. Ala., 1979); maintenance of its all-white character through racial steering, advertising and marketing directed exclusively toward white buyers; its attempt to secede from the Jefferson County school system after that system was ordered to desegregate and its establishment of an all-white school system, subsequently abolished by court order; and its failure to hire a single black employee while hiring white workers who resided up to 50 miles outside the city (J.S. App. 10a-12a). The district court correctly held this history relevant in determining the purpose behind the city's annexation policy. See *Rogers v. Lodge*, 458 U.S. at 624-626; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

Turning specifically to the city's annexation policy, the court noted that Pleasant Grove has annexed numerous white or vacant areas, but has never approved annexation of an area containing a single black resident. Indeed, the court found that the city was so intent on remaining all white that it refused to annex two white areas because that action might have a "mushroom effect" leading to later annexations of adjacent black areas (J.S. App. 4a n.4).

The district court's finding of a racially discriminatory purpose did not depend solely on the City's long and pervasive history of racial discrimination. Other evidence supports the conclusion that the two contested annexations were racially motivated. The Glasgow addition was inhabited exclusively by 14 white citizens, and the Western addition, while uninhabited (J.S. App. 17a n.5), was intended exclusively for white residential development (*id.* at 4a n.5).

Such development could result in the addition of numerous white voters but no black voters to the rolls and could abridge the effective participation of blacks who may choose to register and vote in Pleasant Grove.⁵

In response to this evidence of discriminatory purpose, the city contends that it based its decision to annex the Western Addition, while refusing to annex any black areas, on economic considerations. It argues that annexation of the Western Addition would bring to it development fees for the houses to be built in that vacant area and that the two black regions offer no such benefits. As the district court found, however (J.S. App. 9a), the Highlands area contains sufficient undeveloped land for the construction of 80 new homes and, additionally, would generate immediate tax revenues for the city. Moreover, the district court found that the city had not undertaken any comparative economic analysis of the annexations and specifically found the city's allegations that it had done so to be a sham and labeled its economic justification a pretext for race-based discrimination (*id.* at 5a-6a). The city does not challenge the bulk of these findings in this Court, but simply reasserts that it annexed the Western Addition to benefit from the fees that new development would generate (J.S. 16-17). Nor does the city attempt to offer any justification for its annexation of

⁵The planned white residential development in the Western Addition makes clear that this addition comprises a voting change that is subject to review under Section 5. Of course, it is sometimes difficult to project whether an annexation of vacant land "will * * * have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. 1973c). We have not found this task to present unusual difficulties in administrative Section 5 enforcement, however; in the case at bar, the city itself projected the development of the land and the fact that the development would serve white citizens is not seriously disputed. Obviously, the annexation of territory that will not lead to voting changes (*e.g.*, annexation of land for a public park) does not require Section 5 review.

the fully developed Glasgow Addition, which the district court found had imposed a financial burden on the city (J.S. App. 7a n.13). In sum, appellant's purported economic justification merely resurrects factual arguments that were properly rejected by the district court.

In view of Pleasant Grove's extraordinary history of official racial discrimination, its consistent refusal to annex black areas while annexing several white areas, the potential the annexations have to abridge the rights of current black residents and potential future black voters, and the pretextual character of the justifications for this policy, there was ample evidence to support the district court's finding that the Western and Glasgow annexations were motivated by race and, therefore, violated Section 5.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

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APRIL 1986

3
No. 85-1244

Supreme Court, U.S.

FILED

MAY 12 1986

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States
District Court For The District Of Columbia

BRIEF OPPOSING MOTION TO AFFIRM

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1985

No. 85-1244

CITY OF PLEASANT GROVE, *Appellant*
 v.

UNITED STATES OF AMERICA, *Appellee*

**On Appeal From The United States
 District Court For The District Of Columbia**

BRIEF OPPOSING MOTION TO AFFIRM

The Government's motion to affirm fails to rebut the jurisdictional statement's showing that the district court's findings with respect to the racial motivation for the city's annexation policy are clearly erroneous.¹

The district court below and the Government here summarily describe Pleasant Grove's annexations since

¹ This case was adjudicated entirely on a written record. Accordingly, it presents the issue whether the "clearly erroneous" standard applies to appellate review of findings not based on credibility determinations despite this Court's statement in *Anderson v. Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-9, that the "clearly erroneous" standard does apply in such

1945 in an attempt to show that its annexation policy was racially motivated, but among all of these annexation decisions the only one on which the Justice Department based an objection under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973, was the decision not to annex Pleasant Grove Highlands. The 1945 annexation of a vacant 40-acre tract to the southeast of the city took place before the passage of the Voting Rights Act. The 1967 annexation was approved by the Justice Department and has brought approximately 36 (non-voting) black residents into the city. Pleasant Grove attempted in 1981 to drop the annexation of the Glasgow Addition when the Government demanded that Pleasant Grove seek pre-clearance. That annexation is before this Court only because the district court ordered Pleasant Grove, against its express wish, to seek pre-clearance. The Justice Department did not condition approval of the Western Addition on Pleasant Grove's reconsideration of its refusal to annex the Sylvan Springs, Kohler, or Westminster Subdivision areas, all of which are inhabited by white persons, nor Pleasant Grove's failure to annex the Woodward School, an area apparently containing no voters, or Dolomite, an economically depressed racially-mixed area. Approval for the annexation of the Western Addition was conditioned only on annexation of Pleasant Grove Highlands. The simple fact is that Pleasant Grove Highlands was the first black area to be contiguous to Pleasant Grove and thus available for annexation under Alabama law which was arguably equal eco-

circumstances, if (1) this Court does not agree that the district court's findings were clearly erroneous, and (2) if, as Justice Blackmun wrote in his separate opinion in *Anderson, supra*, the Court's statement on that issue was not a holding.

nomically and thus a plausibly rational choice for annexation.

The Government's motion to affirm portrays Pleasant Grove's "annexation policy" as selecting white islands in the racially mixed sea of Jefferson County (Motion to Affirm, p. 2). This is inaccurate in two respects. First, Pleasant Grove expanded in an all-white sea until after the 1967 and Glasgow Addition annexations and the development of the Pleasant Grove Highlands subdivision during the 1970's.² Second, there is no evidence on this record that Pleasant Grove ever attempted to persuade annexable areas to become part of Pleasant Grove. The annexable areas persuaded the councilmen of the City to take them in, presumably for the same reason Pleasant Grove Highlands wants to be annexed, to wit, to obtain a dollar's worth of city services for taxes of twenty-eight cents or less. Pleasant Grove can have no racial motivation to bring in white areas to defend its internal white majority. It has always been for voting purposes all white, and it has consistently annexed undeveloped areas in preference to relatively developed areas with white populations. Even the Glasgow Addition, the most densely developed of any area annexed, is only one-tenth as densely developed as Pleasant Grove Highlands.

² The Government's Exhibit 36 shows as of 1980 only three black or racially mixed census blocks contiguous to Pleasant Grove, to wit, Pleasant Grove Highlands, Dolomite, and a part of Maytown-Sylvan Springs Division, which is contiguous only to the Glasgow Addition and about which no details are on this record because it never petitioned for annexation or otherwise became an issue in this case. All the other areas surrounding Pleasant Grove are inhabited by white persons.

Thus, there is no basis for stigmatizing the City Council's February 5, 1977, decision to annex the Western Addition or any of its prior annexation decisions as racially based even if the subsequent refusal to act favorably on Pleasant Grove Highlands' April, 1979, petition was. Because the City Councilmen had no way of knowing that Pleasant Grove Highlands would petition two months later, no conceivable racial issue was presented to the council on February 5, 1979. Had the Western Addition and Pleasant Grove Highlands' petitions been presented to the City Council together on February 5, 1979, an otherwise rational, informed councilman who wished to minimize the presence of blacks in Pleasant Grove would have voted against both petitions because (1) the sale of any house in Pleasant Grove entails the possibility that a black person will buy it, and (2) any voting rights change invites the Justice Department to weigh in as an ally of those substantial forces in Pleasant Grove who affirmatively wish to integrate Pleasant Grove.³ No aspect of the annexation of the Western

³ These forces include most prominently Councilman Milton C. Russell whose company owned land in the Western Addition and whose company was among the plaintiffs in the case of *Wheeler, et al. v. City of Pleasant Grove*, Civil Action No. 78-G-1150-S, a case in which Russell, individually, was a defendant as a member of the City Council. This case involved according to the Government's brief "an exclusionary zoning ordinance that was struck down because of its racially discriminatory effect" (Motion to Affirm, p. 9). Such a conclusion is no doubt what plaintiffs wished, but the Court's final decision, which was filed below, specifically found that "the [racial] discrimination claim was totally without merit" (p. 4) and "the plaintiffs failed to prove any racial discrimination whatsoever" (p. 8) and "there was no showing of racial discrimination" (p. 20). Glen E. Parmley, a

Addition tends in any way to exclude blacks from or to minimize their voting rights in Pleasant Grove. The tendency of the annexation with respect to the black presence in Pleasant Grove, *de minimus* though it be, is to increase the black presence.

In any event, the Government's motion to affirm (p. 10) wholly fails to address the essentials of Pleasant Grove's economic argument, to wit, that if Pleasant Grove should decide to bring seventy-nine (79) already built homes into the city by annexing Pleasant Grove Highlands instead of building those homes within the city, the city would give up \$45,820 in development fees from the 79 houses, and that additional tax revenue from an already developed area is unlikely to exceed 28% of the cost of additional services.

It is no answer to this argument that Pleasant Grove Highlands has sufficient undeveloped land for the construction of 80 new homes. Pleasant Grove's economic interest is best served by annexing land none of which is developed. Nor could Pleasant Grove rationally be persuaded to annex Pleasant Grove Highlands because the annexation would provide immediate tax revenue, since such increased revenue would constitute at most only 28% of increased expenditures.

According to the motion to affirm, the district court "specifically found the city's allegation that it had

councilman between 1968 and 1972 and the prime mover on the City Council with respect to the Glasgow Addition was, together with Russell and others, an applicant to approve plans for a 120-unit apartment complex in Pleasant Grove, which was the underlying issue in *Wheeler, supra*.

[undertaken a comparative economic analysis] was a sham" (p. 10). This is incorrect. The district court's finding as to a "sham" was that "reliance by the City on the committee's recommendation for its decision not to annex Pleasant Grove Highlands is a sham" (J.S. 6a). What is disturbing about that finding is that in the parties' submissions on the merits below both Pleasant Grove (main brief, p. 9) and the Government (brief p. 16) agreed, with appropriate citations to the record, that the committee made *no* recommendation to the City Council. Needless to say Pleasant Grove never argued that the city relied on a committee recommendation which according to its own argument was never made.

Pleasant Grove concedes that it made no "comparative economic analysis" of the consequences of annexing the Western Addition and Pleasant Grove Highlands before it approved the annexation of the Western Addition. The City Council simply did not know at that time that Pleasant Grove Highlands wished to be annexed. If Pleasant Grove had conducted a "comparative economic analysis" with respect to Pleasant Grove Highlands before the matter was in litigation, the Government would now argue disparate treatment because Pleasant Grove had never conducted any "comparative economic analysis" before acting on any previous annexation request.

Finally, the Government asserts that the City does not attempt to offer "any justification for its annexation of the fully developed Glasgow Addition, which the district court found had imposed a financial burden on the city" (Motion to Affirm, p. 11). This is inaccurate. The Government cannot consistently insist that the Glasgow Addition with four houses on forty

acres at the time of annexation, or .1 structure per acre, is fully developed if the Government also insists that Pleasant Grove Highlands is undeveloped because there is sufficient undeveloped land for 80 additional houses where at the time of annexation there were already sixty homes on sixty acres in Pleasant Grove Highlands, or one structure per acre. There may or may not be as much undeveloped land in the Glasgow Addition as in Pleasant Grove Highlands, but there is much less financially burdensome developed land in the Glasgow Addition and certainly the ratio of undeveloped to developed land, which is the relevant figure, is much higher in the Glasgow Addition than in Pleasant Grove Highlands.⁴

If Pleasant Grove can show that it loses \$45,820 in development fees by taking seventy-nine already built homes into the city and that those newly built homes can only contribute 28% of increased expenditure in increased taxes, it follows inevitably that Pleasant Grove should not take the seventy-nine already built homes into the city. Because the Government in its motion to affirm does not take issue with either the \$45,820 figure or the 28% figure,⁵ Pleasant

⁴ Judge MacKinnon referred to the Glasgow Addition as "practically undeveloped" (J.S. 25a) but concluded that the annexation was approved as a personal favor to the Glasgow family (J.S. 17a-18a, n. 5). We concur with that conclusion on the whole, but at least Councilman Parmley considered the development potential of the land before annexation, and the Council's decision might have gone the other way if the land had not been "practically undeveloped."

⁵ 28% is the outside figure. Below the Government conceded that 14% was the actual figure for the fiscal year ending September 30, 1980 (J.S. 23a-24a).

Grove's argument must be accepted and the district court's findings with respect to the city's racial motivation rejected as clearly erroneous.

WHEREFORE, for the foregoing additional reasons, appellant respectfully submits that the questions presented are so substantial as to require plenary consideration.

Respectfully submitted,

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(4)
No. 85-1244

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OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

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THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States
District Court For The District Of Columbia

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED JANUARY 23, 1986
PROBABLE JURISDICTION NOTED MAY 19, 1986

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**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

CIVIL ACTION NO. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

TO: The Honorable Bobby R. Patrick &
The City Council of Pleasant Grove

FROM: Concerned Citizens

DATE: April 17, 1979

SUBJECT: Annexation Into the City Limits

We, the undersigned citizens and registered voters of West Smithfield Manor, a subdivision of Pleasant Grove Highlands, and the registered voters along the Five Acre Road, would like to petition the City of Pleasant Grove to consider us as a request for annexation into the city limits.

Please give this your serious consideration. (Concerned citizens)

Attachment

<u>NAME</u>	<u>ADDRESS</u>	<u>PHONE NO.</u>
-------------	----------------	------------------

[Signatures omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR
THE
DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ANSWERS TO DEFENDANT'S INTERROGATORIES
TO PLAINTIFF (SET 1)

GENERAL OBJECTION: Because there are no black voters in Pleasant Grove, the proposed annexation challenged here cannot lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral process," *Beer v. United States*, 425 U.S. 130, 141 (1976), plaintiff is entitled to judgment, and virtually all of the information requested by defendant's interrogatories is irrelevant.

SOURCE: Where there is a source of information in addition to Mayor Donald R. Morrison, Sr. or the records of the City of Pleasant Grove, the source is set out in parenthesis.

INTERROGATORIES

INTERROGATORY 1:

Please identify the date of the incorporation of the City of Pleasant Grove, and all minutes and records of public or private meetings respecting the incorporation.

ANSWER TO INTERROGATORY 1:

November 17, 1933. See file at Pleasant Grove City Hall entitled "Old Incorporation and Minutes of Meetings, January 1, 1934 - December 31, 1938." All public files are available during working hours. I know of no other records.

INTERROGATORY 2:

Please describe in detail the processes through which the boundaries of the City of Pleasant Grove can be altered.

ANSWER TO INTERROGATORY 2:

See Exhibit A.

INTERROGATORY 3:

Please identify by map each change in the boundaries of the City of Pleasant Grove since the incorporation of the city.

- (a) Identify the extent and nature of development of each parcel affected by such change at the time of change and at the present.
- (b) Identify the number of persons by race residing in each affected area at the time of change and at the present time.
- (c) Identify the method through which the change in boundary was accomplished.
- (d) Identify the date of each such change in boundary.
- (e) Identify each study conducted by or made available to the City of Pleasant Grove respecting each proposed boundary change. Identify the source and basis for each such study.
- (f) Identify the owners of real property within each affected area at the time of change.

ANSWER TO INTERROGATORY 3:

1945 annexation—see Exhibit B.

- (a) This parcel was undeveloped in 1945. The area is now approximately half developed with single-family houses.
- (b) In 1945, no one lived in this area. Approximately 100 people live there now. As far as I know, they are all white.
- (c) Legislative act.
- (d) 1945
- (e) I know of no such studies.
- (f) Woodward Iron Company. (James Medlock, Building Inspector)

1967 annexation—see Exhibit B.

- (a) Parcel I was completely undeveloped and still is. Parcel II contained 15 houses altogether in 1967, on 4th Place, 4th Way, and 3rd Street. Approximately 300 houses have been added since. Parcel II was developed with two rest homes and four houses and still is. One rest home has added an addition.
- (b) Parcel I has never had any residents. Parcel II had approximately 40 residents, all white, in 1967 and has approximately 900 today, all white. Parcel III had approximately 150 residents in 1967, all white. It has approximately 230 today, 205 white and 25 black. (Sarah Mays, City Clerk)
- (c) Legislative act.
- (d) 1967
- (e) I know of no such studies.
- (f) Objection. It would be unduly burdensome to determine the ownership of every parcel. U.S. Steel Corporation owned Parcel I and part of Parcel III. Woodward Iron Corporation owned most of Parcel

II. The remainder was owned, as far as I know, by individual families and the rest homes.

1969 annexation—see Exhibit B.

- (a) Four houses, all belonging to the Glasgow family, were on this parcel in 1969. Two houses, also belonging to the Glasgows, have been added since.
- (b) Fourteen in 1969, 20 today, all white.
- (c) Legislative act.
- (d) 1969.
- (e) I know of no such studies.
- (f) The Glasgow family.

(Sarah Mays)

INTERROGATORY 4:

Please identify each instance in which residents or property owners have sought to be annexed to or deannexed from the City of Pleasant Grove, but where the such request has not been positively acted upon (i.e. has been either denied or not acted upon).

- (a) Identify copies of all documents relating to the request.
- (b) Identify the date of the request.
- (c) Identify the race of the persons making the request.
- (d) Identify by map the boundaries of the area involved in the request.
- (e) Identify the dates of all public and private meetings involving any city official at which the requests were discussed. Identify all records of such meetings.
- (f) Describe the reasons for the denial or failure to act upon each such request.
- (g) Provide copies of all documents relating to the city's response to such requests.

ANSWER TO INTERROGATORY 4:

Kohler petition

- (a) I know of none.
- (b) 1969
- (c) White
- (d) See Exhibit B.
- (e) Two telephone calls between Mr. W. J. Kohler and former Mayor Bobby R. Patrick in 1969. I know of no records.
- (f) The City planned to expand westward on undeveloped land and was not interested in considering any other annexations.
- (g) Objection. This is not an interrogatory. (Bobby R. Patrick, former Mayor)

Westminster Subdivision petition

- (a) There was such a written petition. I am attempting to locate it, and if I do, plaintiff will produce it.
- (b) Unknown at this time.
- (c) White.
- (d) See Exhibit B.
- (e) One telephone conversation and one meeting between Mayor Patrick and a representative of petitioners. I know of no records of such meetings.
- (f) The City planned to expand westward on undeveloped land and was not interested in considering any other annexations.
- (g) Objection. This is not an interrogatory. (Bobby R. Patrick)

West Smithfield Manor petition

- (a) Exhibit C. Minutes of meetings when the issue was discussed are available at City Hall during normal working hours.
- (b) April 18, 1979.
- (c) Black.
- (d) See Exhibit B.
- (e) The Council met on May 5, 1979 and June 18, 1979. The committee which was assigned to report on the matter met on two occasions between those two dates. Minutes of the Council meetings are available at City Hall. There are no other records.
- (f) The City had plans to expand westward on undeveloped land, and wasn't interested in considering any other annexations.
- (g) Objection. This is not an interrogatory.

Dolomite petition

- (a) Exhibit D.
- (b) October 1, 1979.
- (c) Black.
- (d) See Exhibit B.
- (e) Meetings of the City Council on October 1, November 5, and November 19, 1979, and March 17, 1980. Minutes of these meetings are available at City Hall.
- (f) The City had plans to expand westward on undeveloped land and was not interested in considering any other annexations.
- (g) Objection. This is not an interrogatory.

INTERROGATORY 3:

With respect to the area annexed by Act 79-419 (1979), please identify each person with a legal interest in any

real property in the annexed area, the race of each such person, and the date of acquisition of that interest.

ANSWER TO INTERROGATORY 5:

The owners of record at the time of annexation were Mead Corporation, Gary Dobbs, and the City itself. Gary Dobbs is white. Mead acquired its interest around 1970; Dobbs acquired his also around 1970; and the City acquired its interest in 1975. I know of no other "legal interest(s)" and object to obtaining them on the ground that in attempting to do so, I would be intruding on others' private business, and on the further ground that such "legal interest(s)" are not relevant to this lawsuit and are not likely to lead to admissible evidence.

INTERROGATORY 6:

Please identify each person who has served on the governing body of the City of Pleasant Grove.

(a) Identify the race of each such person.

(b) Identify the dates of service of each such person.

ANSWER TO INTERROGATORY 6:

All persons who have served on the governing body of Pleasant Grove have been white. Plaintiff objects to identifying each person who has served on the governing body of Pleasant Grove and identifying the dates of service of each such person on the grounds that to do so would be unduly burdensome and on the further ground that the information requested is not relevant to this lawsuit. Documents containing most of this information, however, are available for inspection during working hours at City Hall.

INTERROGATORY 7:

Please identify all records maintained or published by the City of Pleasant Grove, its agents and licenses, since the date of incorporation of the city which pertain to (a) public hearings on proposed actions of the municipal governing body; (b) recorded votes of the municipal governing

body; (c) annexations of land to the city; (d) each ordinance adopted or rejected by the City of Pleasant Grove.

ANSWER TO INTERROGATORY 7:

These records are available for inspection during working hours at City Hall. Plaintiff objects to identifying each of these records on the ground that to do so would be unduly burdensome and on the further ground that most of these records are irrelevant to this lawsuit.

INTERROGATORY 8:

Please identify those ordinances of the City of Pleasant Grove which protect residents against discrimination on account of race in housing, employment, public accommodations, and voting.

(a) Identify the date of adoption of each such ordinance.

(b) Identify each instance in which each such ordinance has been enforced.

(c) Identify the personnel responsible for enforcing each such ordinance and the sources and extent of funding for enforcement.

ANSWER TO INTERROGATORY 8:

There are none.

INTERROGATORY 9:

Please identify each position of employment of the government of the City of Pleasant Grove

(a) Identify the duties and salary of the incumbent for each such position.

(b) Identify the race of the incumbent for each such position.

(c) Identify whether the incumbent for each such position resides within the Pleasant Grove City limits.

ANSWER TO INTERROGATORY 9:

An organizational chart of City employees is attached as Exhibit E. The race of all incumbents is white. 27 of

the 72 City employees reside outside the City limits. (Sarah Mays) Plaintiff objects to further answering this interrogatory on the ground that to do so would be unduly burdensome and on the further ground that the answer is irrelevant to this lawsuit.

INTERROGATORY 10:

Please identify each comprehensive plan or other zoning or planning document adopted by or proposed for adoption by the City of Pleasant Grove.

ANSWER TO INTERROGATORY 10:

The Pleasant Grove Comprehensive Plan, recommended to the City Council on March 14, 1978, is available at City Hall during working hours.

INTERROGATORY 11:

Please identify each restriction on the sale of real property to any person or class of persons contained in any deed of land within the current boundaries of the City of Pleasant Grove as of the time of or subsequent to the date of incorporation of the city.

ANSWER TO INTERROGATORY 11:

Plaintiff objects to answering this interrogatory on the ground that it is overbroad and that the only way the City could answer it would be to research each deed at the local recorder of deeds. The task could easily be undertaken by defendant, which has far greater resources. The information requested is also irrelevant. I have personally never seen a racial restriction in a deed to property in Pleasant Grove.

INTERROGATORY 12:

Please identify each application or proposal to build multi-family housing units within the City of Pleasant Grove, or to build any type of low-income or other public housing within the city.

- (a) Identify the applicant or proponent of each such proposal.
- (b) Identify the action taken by the City of Pleasant Grove respecting each such proposal.
- (c) Identify the date and any record of each public or private meeting attended by any elected or appointed official of the City of Pleasant Grove at which such proposals were discussed.

ANSWER TO INTERROGATORY 12:

- (a) See Exhibit F. There is also Section 235 housing in Pleasant Grove, but the City does not get involved in that process. Plaintiff objects to answering this interrogatory with regard to Section 235 housing on the ground that to answer it would be unduly burdensome and on the further ground that the information sought is irrelevant to the lawsuit.
- (b) The application was approved by the Planning Board. The City Council later passed an ordinance which had the effect of overruling the Planning Board.
- (c) The records of public meetings at which this matter was discussed are available at City Hall during normal working hours. Plaintiff objects to the identification of any private meetings on the ground that these were in preparation for ongoing litigation in *Wheeler et al. v. City of Pleasant Grove, et. al.* (N.D. Ala. CA78 G1150S).

INTERROGATORY 13:

For each and any of the Defendant's First Request For Admissions denied in whole or in part by plaintiff City of Pleasant Grove, please state fully all reasons why such request for admission was denied. Please include in your answer all facts and studies which may tend to indicate that the statement made in the request for admissions is not true and identify the sources for all such facts.

ANSWER TO INTERROGATORY 13:

See Answers to Defendant's First Request for Admissions.

I, Donald R. Morrison, Sr., Mayor of the City of Pleasant Grove, do hereby swear that I have read the foregoing answers to defendant's interrogatories to plaintiff (set 1) and that these answers are true based on my personal knowledge, the records of the City of Pleasant Grove, and conversations with Bobby R. Patrick, Sarah Mays, and James Medlock.

/s/Donald R. Morrison, Sr.
Donald R. Morrison, Sr.

[Notarization, attorneys' signatures, and exhibits omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT OF BOBBY R. PATRICK

I, Bobby R. Patrick, being first duly sworn, hereby depose and say:

(1) I live in the City of Pleasant Grove, Jefferson County, Alabama, at 197 Park Place, have lived there since 1968, and have been a resident of Pleasant Grove since 1940. The City is governed by a Mayor and a Council of five members, all of whom are elected at large. I was elected Mayor in October, 1968, and served for 12 years until October, 1980. I am now employed at the McLeod Agency as an insurance agent.

(2) In late 1978 we were approached by land owners, Nathan Stott, Gary Dobbs, Sr., and Roy Satterwhite, President of Mead Land Services, to have annexed property which they owned into the corporate limits of Pleasant Grove. I brought up these requests at the meeting of February 5, 1979. I showed the other members of the Council where the area to be annexed, which included some 50 acres of land which belonged to the City but which had not yet been annexed by the City, was located. All the land was and is completely uninhabited. I described how the area would be subdivided and recommended that we

adopt the Resolution annexing the land. Mr. Capps made a motion to that effect, Mr. Cain seconded, and the motion carried with one abstention. (Attachment 1.)

(3) The reason I recommended that the Resolution be passed and the reason I voted for it was that it was similar to development we had had in the past, and it was keeping with the present character of the City.

(4) I asked State Senator Mac Parsons to introduce legislation in the Alabama Legislature which would accomplish the annexation. The bill was advertised in the newspaper on February 21 and 28 and March 7 and 14, 1979. (Attachment 2.) On July 17, 1979 the Governor of Alabama signed the Act into Law. (Attachment 3.)

(5) On April 18, 1979, I received a petition from residents of West Smithfield Manor and nearby Five Acre Road that their area be annexed into the City. (Attachment 4.) On May 7, 1979, I reported receipt of the petition to the Council. Representatives of the petitioners attended the meeting and were asked why they wanted to be annexed into Pleasant Grove. They answered that they had read in the papers that we would be withdrawing fire protection and they wanted to make sure that they kept their fire protection and that this could be accomplished by annexation. I asked Mr. Donald R. Morrison, Sr. to chair a committee consisting of himself, Mr. Joe Cooper and Mr. Hollis Cain, to study this petition.

(6) At the Council meeting on June 18, 1979, Mr. Morrison submitted a Resolution by which West Smithfield Manor would continue to receive fire protection. After discussion, the Council agreed that the Resolution was meant to accord fire protection only and not paramedic services, and as so understood, the Resolution was passed unanimously.

(7) The Council never acted in any other fashion on the petition from West Smithfield Manor and residents of Five

Acre Road to be annexed to Pleasant Grove during my term as Mayor, which ended October 6, 1980.

/s/ BOBBY R. PATRICK
BOBBY R. PATRICK

[Notarization and Attachments omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2589

CITY OF PLEASANT GROVE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT OF DONALD R. MORRISON, SR.

I, Donald R. Morrison, Sr., being first duly sworn, hereby depose and say:

(1) I am a resident of the City of Pleasant Grove, Jefferson County, Alabama. I live at 544 Park Road. I served as a member of the Council of Pleasant Grove from October 1, 1972 through October 6, 1980. On October 6, 1980 I was sworn in as Mayor of the City of Pleasant Grove and am serving as Mayor at the present time.

(2) Although a member of the Council on February 5, 1979, I did not attend the Council meeting which took place on that day. Accordingly, I did not vote on the Resolution which was adopted at the meeting on that date concerning the annexation of 450 acres on the western boundary of the City.

(3) I attended a meeting on May 7, 1979, at which a delegation of approximately ten people representing a larger group residing in West Smithfield Manor and along Five Acre Road submitted a request for annexation by Pleasant Grove. At the Council meeting on March 5, 1979, we had decided to withdraw fire and paramedic service

previously extended to neighboring areas. We were withdrawing that service because we found we were overextended and needed to keep our equipment closer to the City limits. (Attachment 1.) At the May 7 meeting someone on the Council asked the delegation why they wanted annexation, and they told us that they wanted to make sure they had fire protection.

(4) The Mayor asked me to serve as Chairman of a committee to study the petition. The other members of the committee were Joe Cooper and Hollis Cain. I asked Dot Presley, the Mayor's Secretary, to find out how much demand for our fire and paramedic service came from West Smithfield and discovered that in the year 1978 there had been only one call. Our committee, as a result, recommended that we extend fire protection to West Smithfield Manor and that recommendation was adopted by the Council, with the deletion of paramedic service. We made no other recommendation from the petition for annexation, and the Council, as a whole, has never acted on it. (Attachment 2)

(5) In October of 1980, after I assumed the office as Mayor and after discussing the matter informally with the newly elected Council, I decided, with their consent, to give West Smithfield Manor the paramedic service as well.

(6) In March, 1981, I appointed a new committee to study the annexation request of West Smithfield Manor and Five Acre Road area. The group consists of Joe Cooper, Clyde Morgan, and Pete Mosley as Chairman. I also asked my Department Heads to submit reports on the economic effect which the annexation of this area would have on their Departments. The committee has not yet reported to the Council.

(7) The present population of Pleasant Grove is 7,086. All of these, to the best of my knowledge are white, except for 32 blacks, all of whom live in nursing homes, and one Oriental.

/s/ DONALD R. MORRISON, SR.
DONALD R. MORRISON, SR.

[Notarization and Attachments omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2589

CITY OF PLEASANT GROVE

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

AFFIDAVITT OF SARAH A. MAYS

I, Sarah A. Mays, being first duly sworn, hereby depose and say:

(1) I live in the City of Pleasant Grove, Alabama, at 1043 8th Street. I have lived in Pleasant Grove since 1939 except for eighteen months when my husband was in the Army. I have been City Clerk of the City of Pleasant Grove and Secretary-Treasurer of the Utilities Board since January 1972. I was appointed Treasurer of the City in February, 1972. A description of my job as City Clerk is attached (Attachment 1).

(2) As the Mayor's delegatee, I have been in charge of every City election since January, 1972. Registration in Pleasant Grove is under the authority of the Jefferson County Board of Registrars. I am a Deputy Registrar. There are no black registered voters in the City of Pleasant Grove.

(3) The Utilities Board of the City of Pleasant Grove operates a water and natural gas distribution business for the City. Natural gas is bought from Southern Natural Gas Company and sold to one industrial and approximately

9,000 residential customers in the City of Pleasant Grove and other areas of Jefferson County (see prospectus of the Utilities Board of the City of Pleasant Grove, dated May 22, 1978, p. 11, Attachment 2).

(4) In the fiscal years ending September 30, 1979 and 1980, the Utilities Board transferred \$629,421 and \$871,852, respectively, to the City of Pleasant Grove. (See Exhibit B to Report of Certified Public Accountants, Utilities Board of the City of Pleasant Grove, years ending September 30, 1980 and 1979, Attachment 3 to this affidavit). Revenues, expenditures, and transfers to the General Fund of the City of Pleasant Grove are set out in Exhibit C to the Report of Certified Public Accountants, City of Pleasant Grove, Year ending September 30, 1980, Attachment 4 to this affidavit. Tax receipts and license receipts are broken down in Schedule 2. The following items of revenue might increase in approximate proportion to population if the City were to annex the areas of Pleasant Grove Highlands and Five Acre Road, either as in the case of the property tax and automobile taxes because the City could impose a tax directly or as in the other cases because the City receives the tax from the State or Jefferson County based in an approximate way on population:¹

¹ The first category under "Revenues" on Exhibit C is "Tax Receipts," which are broken down in Schedule 2. I have included every item in the category "Tax Receipts" as subject to increase should annexation take place, except "Sales and Use Tax," because I assumed annexation would not significantly change shopping patterns, and "Coal Severance Tax," because no coal is mined in the area to be annexed. The second category under "Revenues" on Exhibit C is "License Receipts," which are also broken down in Schedule 2. I have not included "Business License" as subject to increase because there are no businesses in the area requesting annexation. Of the remaining categories under "Revenues" on Exhibit C I have included "Police Department Revenue" because our Police Department would write tickets there if the area were annexed. I have not included "Building Permits" because I have been told that there has been little development there recently. I have not included "Government Grants" because I know of none now

ABC Board	\$ 9,606
Beer Tax	11,196
County Gasoline Tax	20,892
State Gasoline Tax	54,126
Property Tax—.75 mills	80,911
Automobile Tax	15,436
Road and Bridge Tax	6,936
Tobacco Tax	11,208
Auto License	14,150
State Auto License	573
Police Revenue	<u>30,370</u>
	\$255,404

Total expenditures for the City were \$1,790,951, in the year ending September 30, 1980. Thus sources of revenues which would go up in rough proportion to population if Pleasant Grove were to annex the areas of Pleasant Grove Highlands and Five Acre Road were only 14% of the total expenditures for 1980.

(5) Revenue is derived from the development of raw land from two sources, building permits and the installation of service lines, main and water taps. In 1980, a very poor year for building, \$8,593 were derived from building permits (Exhibit C to Attachment 4), and \$135,379 were derived from service lines, mains and water taps (Exhibit B to Attachment 3). In 1979, \$314,261 were derived from service lines, mains and water tap sources. In 1978 and 1977, revenues from these sources were \$272,551 and \$308,592 respectively. (Exhibit B to Report of Certified Public Accountants, years ended September 30, 1978 and 1977, Attachment 5 to this affidavit).

available. I have not included "Rents Received" because that is a fixed rent received from the Utility Board for space rented from the City, nor "Interest" because that is interest on the City's investments, nor "Sales of Pipe and Culvert" nor "Miscellaneous" because I do not see how annexation would affect these items.

JA-24

/s/ SARAH A. MAYS

SARAH A. MAYS, City Clerk & Treasurer

[Notarization and Attachments omitted in printing.]

(5)
No. 85-1244

Supreme Court, U.S.

FILED

JUN 3 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

**On Appeal From The United States
District Court For The District Of Columbia**

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Can the annexation of vacant land or land populated by one white family by a municipality with no black voters deny black voters the right to vote on account of race or color?

2. Can a failure to change a voting practice such as a failure to annex ever be a violation of Section 5 of the Voting Rights Act when Section 5 itself refers only to changes in a voting practice?

3. Can the annexation of vacant land or land populated by one white family be invalidated by a subsequent failure to annex land populated by black persons, where the failure to annex would not lead to a retrogression in black voting rights, but annexation of the land populated by blacks would lead to a retrogression in their voting rights?

4. Did the City of Pleasant Grove bear its burden of proof of showing that the annexation of Pleasant Grove Highlands would be economically disadvantageous by submitting proof, which the Government conceded to be accurate, that revenues derived from the annexation of Pleasant Grove Highlands could not reasonably be expected to exceed between 14% and 28% of increased expenditures?*

*The City of Pleasant Grove and the United States of America were the only parties to the proceedings before the United States District Court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-1244

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

**On Appeal From The
United States District Court
for the District of Columbia**

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia, dated August 3, 1983, denying appellant's motion for summary judgment and its motion for partial summary judgment (J.S. App. 1b-17b) is reported at 568 F. Supp 1455. The opinion of the United States District Court for the District of Columbia dated October 25, 1985, denying appellant's claim for declaratory relief (J.S. App. 1a-26a) is reported at 623 F. Supp. 782.

JURISDICTION

This is an appeal from the decision of a 3-judge court convened pursuant to Title 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, denying a request for a declaratory judgment that certain proposed annexations did not have the purpose or effect of denying or abridging the right to vote on account of race or color. J.S. App. A and C. This Court has jurisdiction under 42 U.S.C. §1973c to review the decision by way of appeal.

On December 19, 1985, appellant filed with the United States District for the District of Columbia a notice of appeal to this Court. J.S. App. D. This Court noted probable jurisdiction on May 19, 1986.

STATUTE INVOLVED

Section 1973c of Title 42 of the United States Code provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973(b) of this title are in effect shall

enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney

General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. [Emphasis in original text]

STATEMENT OF THE CASE

The City of Pleasant Grove (hereinafter "Pleasant Grove") is a municipal corporation located in Jeffer-

son County, Alabama. Record, Document 4, p. 1.¹ Although Pleasant Grove has a few black residents, 32 out of total population of 7,086 as of May 12, 1981 (JA 8-9),² at the time the annexation decisions in question here were taken all the registered voters were white (JA 10).

Pleasant Grove was incorporated in 1933. JA 4-5. Over the course of the last 53 years, the city has approved four annexations. In 1945, an uninhabited parcel of less than 40 acres was added on the southeastern corner of the city. JA 5-6 and Ex. B.³ In 1967, after preclearance by the Department of Justice, the city annexed three non-contiguous parcels. Parcel I, consisting of approximately 120 acres, was entirely developed then and still is. JA 6 and Ex. B. Parcel II, consisting of approximately 1,320 acres, had approximately 40 white residents in 1967 and approximately 900 white residents as of February, 1981. JA 6 and Ex. B. Parcel III, consisting of less than 40 acres had approximately 150 white residents in 1967 and approximately 230 residents, 205 whites and

¹ The District Court Record is not paginated. The individual documents are numbered as set out on the docket sheet. The Government suggested, Pleasant Grove agreed, and the Court ordered that the decision be rendered on the record as a whole (Document 60, pp. 2, 6), so everything in the record has been admitted into evidence. Accordingly, the record will be referred to by document (D.), exhibit (Ex.), and page (p.).

² The 32 blacks were residents of Pleasant Grove's nursing homes. D. 24, Ex. C, Ex. D. The Government has not alleged that Pleasant Grove has denied the nursing home residents their voting rights and the district court treated the city as all-white for voting purposes. J.S. App. 2b n.3.

³ Ex. B is the 1979 postal map of Pleasant Grove.

25 blacks (the nursing home residents), as of February, 1981. JA 6 and Ex. B. In 1969, the city annexed a 40-acre parcel to the northwest, known as the "Glasgow Addition." This area had 14 white residents in 1969 and 20 as of February, 1981, all of whom were members of the Glasgow family. JA 7 and Ex. B.

In late 1978, owners of property on the western edge of Pleasant Grove contacted the Mayor, then Bobby R. Patrick, and requested that Pleasant Grove annex approximately 450 acres to the west of the city (the "Western Addition"). All of the land was completely uninhabited. JA 15. The owners of the property included the city itself (JA 10), and companies associated with Nathan Stott, a resident and long-established developer in the city (D. 70, pp. 6-8, 14), and Milton Russell, a resident, a long-established developer in the city, and a member of the City Council (D. 30d, pp. 5-6, 14, 27). Mayor Patrick brought the matter up at the meeting of the City Council of February 5, 1979. He showed the councilmen where the land proposed for annexation was located, described how the area would be subdivided, and recommended that the city adopt a resolution annexing the land. The resolution carried with one abstention. JA 15-16.

Patrick asked State Senator Mac Parsons in February, 1979, to introduce legislation in the Alabama State legislature which would accomplish the annexation. JA 16. Parsons introduced such a bill two weeks later. Parsons' main concern, and a matter of concern to everyone on the Jefferson County delegation, was that no one be annexed into Pleasant Grove without an opportunity to vote on the issue. D. 30g, pp. 6, 8-10, 14, 20. After Parsons and Patrick allayed State

Senator Vacca's concern that consent to the annexation among the property owners might not be unanimous, the bill was approved unanimously by the Jefferson County Senate delegation, which consisted of six whites and two blacks. D. 30g, pp. 12-14, 24. Parsons was unaware of any opposition to the bill in the Alabama House delegation which included six black members. D. 30g, p. 25. In his three years as a State Senator, Parsons did not know of any instance in which a populated area had been annexed to a city by legislative act. D. 30g, pp. 5, 21-22. The bill was advertised in the local newspapers in February and March, 1979, and on July 17, 1979, the Governor of Alabama signed the legislation into law. JA 6.

At a meeting held on March 5, 1979, the City Council decided to withdraw fire and paramedic service previously extended at no cost to neighboring areas. JA 18-19. On April 18, Patrick received an annexation petition from an area known as Five-Acre Road and a recently developed subdivision then known as West Smithfield Manor which later changed its name to Pleasant Grove Highlands (hereinafter "Highlands"). JA 16. The Highlands is in appearance equal economically to all but the newest subdivisions in the city. The Five-Acre Road area is economically depressed and below city standards. D. 74, p. 16, and attached photographs; D. 24 and attached photographs. At a council meeting held on May 7, 1979, representatives of the areas requesting annexation told the City Council that they desired annexation principally for fire protection. JA 16, 19. Thereafter, Patrick appointed a committee, chaired by Councilmember, later Mayor, Donald R. Morrison, Sr., to study the petition. JA 16. The committee concluded that the annexation of

the petitioning area would not be financially advantageous. D. 30f, pp. 19, 84-85; D. 30c, pp. 22, 26-28; D. 30b, pp. 10-15. They also discovered, however, that only one call for the city's fire and paramedic service had originated in the Highlands in 1978. Accordingly, based on the committee's recommendation, the City Council reinstated fire protection at no cost for the Highlands at its meeting of June 18, 1979. JA 16, 19.

Other than the annexation request of the Highlands and Five-Acre Road areas, the city has failed to act favorably on four annexation requests since 1933. JA 8-9. On August 18, 1969, the city received an annexation request from the white areas of Sylvan Springs and West Grove to the northwest of the city. D. 49, p. 1. After the city determined that United States Steel, an intervening property owner, did not wish the city to annex its intervening property, the city did not further pursue the request. D. 49, pp. 1-2; D. 63, pp. 7-14. Sometime in 1969, W. J. Kohler asked that a small parcel inhabited by whites to the southeast of the city be annexed. JA 8, and Ex. B. At a time never precisely established, the inhabitants of the white Westminster Subdivision petitioned for annexation. JA 8, and Ex. B. On October 1, 1979, the black Dolomite area petitioned for annexation. JA 9, and Ex. B. Mayor Morrison stated on behalf of the city in its answers to interrogatories that the Kohler, Westminster, Dolomite, and Highlands areas were not annexed because "[t]he City had plans to expend westward on undeveloped land and was not interested in considering any other annexations." JA 8-9. In his deposition Mayor Patrick testified that the Dolomite and the Five-Acre Road areas were not com-

patible economically with Pleasant Grove. D. 41g, pp. 91, 103-104. Any annexation, such as the proposed Kohler, Westminster, and Highlands annexations which expanded Pleasant Grove in the direction of Dolomite or the Five-Acre Road areas created what Patrick called the "mushroom" problem. D. 41g, pp. 55, 91, 103. If "you take one, [then] I think from the gentleman's standpoint you are going to find it difficult not to take the next one." D. 41g, p. 104, see p. 56.⁴

After completion of all Alabama state procedures, Pleasant Grove sought preclearance for the annexation of the Western Addition. By letter dated February 1, 1980, the Civil Rights Division of the Department of Justice denied preclearance on the ground that the city had not sought to annex "identifiably black areas" as well as the Western Addition. D. 24, Ex. F, p. 1. The city requested reconsideration (D. 24, Ex. G), but when it appeared that a favorable reconsideration would not be forthcoming, Pleasant Grove filed this action on October 9, 1980. D. 1.

⁴ The district court opinion and the Government's motion to affirm refer to a refusal to annex the site of the black Woodward School. J.S. App. 3a, n. 3; motion to affirm, p. 2. In the Government's opposition to the city's motion for summary judgment, the Government relied on the answers to defendant's second request for admissions, number 8, for this proposition. D. 35, p. 11. The city's answer to that request, however, was that the memory of the undersigned was not sufficiently clear to admit or deny the request. D. 23, p. 24. No motion to compel a further answer was filed. In any event, there is no evidence that the Woodward School site had any voters, white or black, so its significance in an examination of Pleasant Grove's pattern of annexation for voting purposes is limited.

Billy F. Graham, one of those signing the Highlands petition for annexation, went to a meeting in June, 1980, with Mayor Patrick. Patrick appeared upset because the Justice Department had objected to the annexation of the Western Addition. In July, 1980, Graham had a meeting with Albert Mason, another leader of the Highlands petitioners, and they decided to allow the Justice Department to handle the matter. D. 68, pp. 12-17, 31-32.

Morrison assumed the office of Mayor on October 6, 1980, and after discussing the matter informally with the newly elected Council, gave the Highlands the requested paramedic service at no cost as well. In March, 1981, Morrison appointed a new committee, the "Annexation Committee," to study the Highlands' annexation request. JA 19. This committee, consisting of Councilmen Pete Mosley, Clyde E. Morgan, and Joseph A. Cooper, met one time and considered documents provided by Mayor Morrison. Mosley and Morgan remembered discussing the figures submitted with the City Clerk and Treasurer, Sarah A. Mays. D. 66, pp. 16-17; D. 64, p. 11. In the end, however, no further action was taken, in part because the matter was already in litigation. D. 66, pp. 13-21; D. 76, pp. 11, 17, 21-28; D. 64, pp. 7-9, 11, 23-25; D. 65.

As a condition of maintaining the action to preclear the Western Addition annexation, the district court required Pleasant Grove also to seek preclearance for the Glasgow Addition annexation, although Pleasant Grove represented that it would abandon that annexation rather than seek preclearance for it. D. 28; D. 32.

Pleasant Grove moved for summary judgment with respect to both annexations. It argued that since there

were only white voters in Pleasant Grove and in the Glasgow Addition and no voters at all in the Western Addition, these annexations could not have the effect of denying black persons the right to vote on account of race or color. D. 24; D. 42. Because there could be no effect, there was no basis for inferring a racial purpose. A purpose of denying blacks the right to vote in Pleasant Grove would best be served not by annexation of land but by a policy of no-growth, because the sale of any house in Pleasant Grove brought with it some chance that a black person would purchase it. D. 30d, pp. 27-28, 30-31. Pleasant Grove also argued that its failure to annex the Highlands was not subject to preclearance under Section 5 because it was not a change in a voting practice or procedure and that if it did attempt to annex the Highlands, instead of voting as a significant minority in Jefferson County where 2 of 8 State Senators of the County delegates are black, the blacks in the Highlands would vote as an insignificant minority in a city where all councilmanic seats are elected at-large (JA 15). The Department of Justice had never previously objected to an annexation where the municipality requesting annexation had no black voters and the area annexed had no black voters. *See* D. 15, pp. 2-4. Finally, Pleasant Grove argued that additional revenue from the Highlands was unlikely to exceed 14% of additional expenditure. JA 21-23.

The Government argued, based on the city's general racial history and on a particular examination of its annexation decisions, that Pleasant Grove had not demonstrated that its annexation decisions viewed as a whole were not racially selective. D. 35; D. 45.

The district court found that the record before it, if unrebutted, would warrant a finding that Pleasant Grove had discriminated on the basis of race in its annexation decisions. J.S. App. 5b. It determined that it was "clear from the precedents (1) that in the context of annexations, the Voting Rights Act applies if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect and (2) that the failure to annex is a violation of the Act provided discriminatory purpose is shown." J.S. App. 10b. Accordingly, by a vote of 2 to 1, the court denied the motion for summary judgment. Judge George E. MacKinnon wrote in his dissent:

... Since the annexations at issue do not *change* any existing minority voting rights and the Voting Rights Act only applies when there is some "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), it is my view that the two annexations, one of which is inhabited by one non-minority family, cannot constitute a violation of the Voting Rights Act, regardless of the motives of the city. Accordingly, summary judgement is appropriate. [Emphasis in original text] J.S. App. 14b-15b.

Thereafter, the case was submitted to the district court on the entire record without trial. See D. 60, pp. 2, 6. Pleasant Grove argued, based on the entire record, (1) that the Highlands' petition was not treated less favorably procedurally than petitions from areas inhabited by white persons, (2) that Pleasant Grove's past practice had not been to annex areas which would

be excluded from annexation on the rationale which denied annexation to the Highlands, and (3) that the rationale advanced for denying annexation to the Highlands was supported by the evidence. D. 85. Pleasant Grove's past practice with respect to annexation had been to annex uninhabited or almost uninhabited land because the city derived a substantial proportion of its revenues from land development. Although there had been annexations to Pleasant Grove, or parts of annexations, where there were motivations other than the economic advantage of development fees, no annexation had taken in an area considered as a whole with a development density greater than 0.1 structure per acre, which was the development density of the Glasgow Addition. The Highlands, not including the Five Acre Road area which the Government conceded was not an appropriate area for annexation, had a development density greater than 1 structure per acre. D. 85, pp. 10-11, JA 5-7, and Ex. B. Only land development fees made annexation economically advantageous, because, as the Government had conceded in the course of the proceedings, revenues which could be expected to rise in approximate proportion to population if the city were to annex the Highlands would constitute only fourteen (14) to twenty-eight (28) percent of the city's expenditures depending on the year in which the calculation was made. JA 21-23; D. 75, Ex. 2.

The district court, again by a vote of two to one, ruled against Pleasant Grove. The court rejected the city's argument that its decisions to annex the "white" Western and Glasgow areas, but not the "black" Highlands were based not on race but on the city's economic self-interest. J.S. App. pp. 4a-5a. The

court found (1) that the city had never conducted an economic study to determine the advantages and disadvantages of a particular annexation, (2) that Pleasant Grove's reliance on the determination of its "Annexation Committee," made during the course of litigation, that the annexation of the Highlands was economically disadvantageous, was a sham, and (3) that substantively, Pleasant Grove's arguments concerning the cost of fire protection, street and sanitation, and police protection, and the loss of revenue from development fees if the Highlands were annexed were unpersuasive. J.S. App. 1a-10a. Finally, the trial court found that Pleasant Grove had adopted discriminatory policies with respect to matters other than annexation which suggested that discrimination motivated Pleasant Grove's annexation policy as well. The trial court denied preclearance. J.S. App. 10a-11a.

In his dissent, Judge MacKinnon pointed out that the areas which the majority characterized as "white" were, in fact, entirely uninhabited (the Western Addition) or practically uninhabited (the Glasgow Addition) (J.S. 15a-17a), and that the racially discriminatory "purpose" required by the decisions in voting rights cases is a purpose related to voting (J.S. App. 18a-19a). Given the absence of a discriminatory effect, he wrote:

It defies all reason and common sense to attribute to a governmental entity the purpose to achieve something that cannot conceivably be achieved. . . J.S. App. 20a.

He noted that this was the first case in which an objection had been raised to the annexation of a mu-

nicipality with no black voters. J.S. App. 21a. He concluded that the annexation should be approved on condition that Pleasant Grove be enjoined from taking any action affecting the Western and Glasgow Addition that would constitute any form of racial discrimination. J.S. App. 22a.

With respect to Pleasant Grove's economic argument, Judge MacKinnon wrote as follows:

. . . there is one very good fiscal reason that Pleasant Grove should prefer annexation of the Western Addition to that of the petitions and indeed prefer annexing any undeveloped area to most inhabited developed neighborhoods. The following statement, based on deposition and exhibits, sums up the City's financial situation:

The City of Pleasant Grove derives most of its revenue, not from taxes or the other usual impositions of city governments, but from the sale of water and natural gas. The City, through its Utilities Board, is the distributor of water and natural gas for the area of Alabama which surrounds it. [Mays affidavit,⁵ para. 3]. In the year ending September 30, 1980, Pleasant Grove's "Total revenues and transfers" were \$1,382,193. [Exhibit C to Attachment 3 to the Mays Affidavit]. "Revenues" contributed only \$449,341 of this amount. \$882,852 came from transfers from other funds." Of that \$882,852,

⁵ The Mays affidavit is reproduced in the joint appendix at JA 21-24.

\$871,852 was transferred from the Utilities Board of the City of Pleasant Grove. . . . "*Revenues*" provided only 28% of Pleasant Grove's expenditures in the fiscal year ending September 30, 1980. [H]owever, not all items under "*Revenues*" could be expected to increase in approximately proportion to population if Pleasant Grove were to annex [petitioners]. . . . [T]he items of revenue which would grow proportionately with annexation total only \$255,404, which is only 14% of "*Total expenditures and transfers* for 1980. [Mays Affidavit, para. 4].

Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at 10-11 (emphasis added). According to the deposition of the City's clerk and treasurer, Sarah Mays, the updated figure for revenues that should increase proportionately to population is 23%. Mays Deposition at 12. The government nowhere contests the accuracy of these figures as a basic outline of the municipality's finances. The City's heavy reliance on profits from the distribution of water and natural gas to the surrounding vicinity provides a powerful reason alone for aversion to annexation of already populated areas. Absent a complete restructuring of the fiscal system, revenues (taxes) from an already developed area could not possibly even approach the

costs of services. . . . [Emphasis in original text] [J.S. App. 23a-24a]

This appeal followed.

SUMMARY OF ARGUMENT

1. An annexation violates Section 5 of the Voting Rights Act if (1) it significantly reduces the proportion of voters of a particular race, and (2) the minority race has been denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community." *City of Richmond v. United States*, 422 U.S. 358, at 370-371 (1971). The annexations in question here did not reduce the proportion of black voters in Pleasant Grove nor deny black voters representation equivalent to their political strength in the enlarged community because there were no black voters in Pleasant Grove or the areas annexed. Because the annexations could not conceivably have had the effect of denying blacks the right to vote on account of their race, there is no basis for inferring that that was the purpose.

2. The failure of Pleasant Grove to act favorably on the Highlands' petition, which was brought to the City Council's attention two months after it voted to annex the Western Addition and eight years after it voted to annex the Glasgow Addition, does not invalidate the prior annexation decisions, assuming *arguendo* that the decision on the Highlands' petition had a discriminatory purpose, because Section 5 "clearly provides that it applies only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, at 138 (1976). Although the issue before the Court in *Beer* was whether a covered jurisdiction was required to demonstrate that a non-change did

not have a discriminatory effect, the language of Section 5 provides no basis for making a distinction in these circumstances between "purpose" and "effect." Accordingly, the rationale of *Beer* covers non-changes with a discriminatory purpose.

3. The Government conceded below that additional revenues to be derived from the Highlands if annexed could not exceed 14% to 28% of additional expenditures. The cost to Pleasant Grove of annexing 79 already built homes in the Highlands rather than taxing the construction of new homes in the Western Addition is \$45,820. Accordingly, the conclusion that the annexation of the Highlands is not in Pleasant Grove's interest is clearly correct.

ARGUMENT

I. The annexation of vacant land or land containing one white family by a municipality with no black voters does not deny any black voter the right to vote on account of race or color.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, prohibits a State or political subdivision subject to Section 4 of the Act, 42 U.S.C. §1973b,⁶ from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it (1) has obtained a declaratory judgment from the District Court of the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on

⁶ The State of Alabama is subject to Section 4. 30 Fed. Reg. 9897 (August 6, 1965).

account of race or color," or (2) has submitted the proposed change to the Attorney General and the Attorney General has not objected to it.

It is established that an annexation constitutes a change in a voting practice or procedure. *City of Richmond v. United States*, 422 U.S. 358 (1975); *Perkins v. Matthews*, 400 U.S. 379 (1971). As the test is set out in *City of Richmond, supra*, at 370-371, an annexation violates Section 5 if (1) it significantly reduces the proportion of voters of a particular race, and (2) the minority race has been denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community."

Because there were no black voters in Pleasant Grove at the time these annexation decisions were taken, only white voters in the Glasgow Addition, and no voters at all in the Western Addition, it is clear that these annexations neither reduced the proportion of black voters in Pleasant Grove nor denied black voters representation equivalent to their political strength in the enlarged community.

Because the proposed annexations could not conceivably have had the effect of denying blacks the right to vote on account of their race, there is no basis for inferring that that was the purpose. As Judge MacKinnon wrote:

It defies all reason and common sense to attribute to a governmental entity the purpose to achieve something that cannot conceivably be achieved, particularly when it is obviously impossible that the voting rights of any black

citizen could be adversely affected. J.S. App.20b.

A purpose of denying blacks the right to vote in Pleasant Grove would best be served by voting against any annexation because (1) the sale of any house in Pleasant Grove entails the possibility that a black person will buy it,⁷ and (2) any voting rights change invites the Justice Department to weigh in as an ally of those substantial forces in Pleasant Grove who affirmatively wish to integrate Pleasant Grove.⁸ No as-

⁷ During the pendency of this lawsuit a black family moved into Pleasant Grove. D. 73, p. 66.

⁸ These forces include most prominently Councilman Milton C. Russell whose company owned land in the Western Addition and whose company was among the plaintiffs in the case of *Wheeler, et al. v. City of Pleasant Grove*, Civil Action No. 78-G-1150-S, decided April 3, 1984, a case in which Russell, individually, was a defendant as a member of the City Council. This case involved according to the Government's motion to affirm "an exclusionary zoning ordinance that was struck down because of its racially discriminatory effect." Motion to affirm, p. 9. Such a conclusion is no doubt what plaintiffs wished, but the Court's final decision, which was filed below (D. 92, Ex. A), specifically found that "the [racial] discrimination claim was totally without merit" (p. 4) and "the plaintiffs failed to prove any racial discrimination whatsoever" (p. 8) and "there was no showing of racial discrimination" (p. 20). Glen E. Parmley, a councilman between 1968 and 1972 and the prime mover on the City Council with respect to the Glasgow Addition (D. 63, *passim*) was, together with Russell and others, an applicant to approve plans for a 120-unit apartment complex in Pleasant Grove, the opposition to which was racially motivated according to the plaintiffs in *Wheeler, supra*. D. 35, Ex. 15, p. 2. Mayor Patrick and Fire Chief Scholl both voted in favor of the apartment complex as members of the Pleasant Grove Planning Board. D. 35, Ex. 21, p. 1.

pect of the annexation of the Western Addition or the Glasgow Addition tends in any way to exclude blacks from or to minimize their voting rights in Pleasant Grove. The tendency of the annexations with respect to the black presence in Pleasant Grove, *de minimus* though it may be, is to increase the black presence.

II. Pleasant Grove's subsequent failure to annex the Highlands cannot invalidate the decisions regarding the Glasgow and Western Additions because the failure to annex the Highlands was not a change in a voting practice or procedure.

The Justice Department objected to the Glasgow and Western Additions not because it found any fault in those annexations *per se*, but because Pleasant Grove failed to act favorably on the annexation submitted some two months later by the Highlands and Five-Acre Road. J.S. App. 4a; D. 24, Ex. F, p. 1. The district court held "that the failure to annex is a violation of the Act provided discriminatory purpose is shown..." J.S. App. 10b. Because Pleasant Grove had not affirmatively shown that there was no discriminatory purpose in the failure to annex the Highlands, the annexation of the Western Addition approved two months earlier by the City Council and the annexation of the Glasgow Addition approved eight years earlier could not be precleared.

This was error.

The residents of the Highlands have never voted in Pleasant Grove. That they do not now vote in Pleasant Grove is thus not a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. §1973c. Section 5 of the Voting Rights Act does not

require preclearance for a failure to change a voting practice or procedure.

This feature of Section 5 was explicitly recognized by this Court in *Beer v. United States*, 425 U.S. 130 (1976), a case in which the City of New Orleans sought preclearance for its reapportionment of the city's councilmanic districts. The district court had denied preclearance upon consideration of how two at-large seats on the seven member council had effected minority voting strength "in the context of all circumstances touching the right to vote in councilmanic elections," *Beer v. United States*, 374 F. Supp. 363, 400 (D.D.C. 1974), although elections for the two at-large seats had been conducted in that fashion since 1954 and were not changed by the proposed reapportionment. On appeal to this Court, however, the United States reversed the position it had taken in the trial court and agreed with appellants that the district court was mistaken in rejecting New Orleans' proposal because it did not eliminate the two at-large seats. This Court wrote:

The appellants and the United States are correct in their interpretation of the statute in this regard.

The language of §5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under §5]." U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After*, 347. The ordinance that adopted [the reapportionment plan] made no reference to

the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in the charter would have required approval by the city's voters. The at-large seats, having existed without change since 1954, were not subject to review in this proceeding under §5. [*Beer v. United States*, 425 U.S. 130, at 138-139 (1976)]

The rationale of *Beer* clearly covers this case. The reason that a covered jurisdiction need not demonstrate that a non-change does not have a discriminatory effect is that Section 5 does not cover non-changes. Because Section 5 does not cover non-changes at all, a covered jurisdiction also need not demonstrate that a non-change does not have a discriminatory purpose.

The district court and the Government would require as a condition precedent for preclearance of the Western and Glasgow Additions, the annexation of the Highlands which, we respectfully submit, can properly be precleared with difficulty, if at all. Instead of voting as a part of a significant minority in Jefferson County (where two out of eight State Senators in the County delegation were black in 1979), the blacks residing in the Highlands would vote as an insignificant minority in a city where all councilmanic seats are elected at large. D. 24, Ex. A. p 1. Such an annexation would fail both prongs of the test in *City of Richmond*, *supra*. It would significantly reduce the proportion of black voters in the place where they were voting, and, because of the at-large feature of

Pleasant Grove's system, it would deny black voters representation reasonably equivalent to their political strength in the enlarged community. Furthermore, because in the district court's view Pleasant Grove cannot rebut the inference to be drawn from its past history that it intends to discriminate racially, the district court would have to find that the Highlands' annexation was motivated by a racially discriminatory purpose.

If it seems anomalous that the Government should argue for such a result, that is because it is anomalous. But for this case, the Government has never objected to an annexation where the municipality requesting annexation had no black voters and the area annexed had no black voters. See D. 15, pp. 2-4; J.S. App. 22a. What the Government is attempting to do, we respectfully submit, is not to protect the voting rights of the black residents of the Highlands, but to procure for those residents the economic benefits which automatically accrue if the area is annexed to Pleasant Grove at the expense of their rights to reasonably proportionate representation in voting. There is no doubt, as we show *infra*, that the residents of the Highlands would derive great economic benefits from being annexed to Pleasant Grove and that Pleasant Grove would suffer corresponding economic detriment, but that was not the end sought by the passage of the Voting Rights Act of 1965.

III. The conclusion that the annexation of the Highlands to the City of Pleasant Grove would not be in the financial interest of the City is clearly correct.

In the statement of genuine issues attached to the Government's response to Pleasant Grove's motion for summary judgment (D. 35), the Government stated that

it "[d]id not contest" the following material facts asserted by Pleasant Grove not to be in issue:

"Revenues" provided only 28% of Pleasant Grove's "Total expenditures and transfers" in the fiscal year ending September 30, 1980. Those "Revenues" which could be expected to increase in approximate proportion to population if Pleasant Grove were to annex West Smithfield Manor are approximately 14% of "Total expenditures and transfers." (Mays Affidavit, paras. 3-4, Attachments 2-3) [Plaintiff's statement of material facts attached to Motion for Summary Judgment, Argument III; D. 24]⁹

It follows inexorably that Pleasant Grove should not annex developed property. Even if it is true, as the Government asserted below, that the Highlands would be no more an economic burden on Pleasant Grove than are the white residential areas which are already in the city, that would not justify its annexation, since *ad valorem* taxes could only provide approximately 14% to 28% of additional expenses. Development fees constitute an important source of city income,¹⁰ and

⁹ The 14% figure varied somewhat from year to year. In the fiscal year ending September 30, 1983, the figure was 23%. D. 75, p. 12, see Ex. 2.

¹⁰ The two fiscal years preceding the city council's decision in February, 1979, to annex the Western Addition were particularly good years for development. Net revenue from the installation of service lines, mains, and water taps was approximately 19% of the city's income in fiscal 1978 and 31% in fiscal 1977. D. 75, pp. 57, 60, Ex. C to Ex. 8, Ex. C to Ex. 9. Gross fees from building permits were 3.4% of the city's budget in 1978 and 2.7% in 1977 (D. 75, Ex. C to Ex. 8, Ex. C to Ex. 9, Ex. B to Ex. 13), but there is no evidence of record as to associated costs. (Percentages calculated by counsel.)

it is only those fees which make annexation economically advantageous. If Pleasant Grove should decide to bring seventy-nine (79) already built homes into the city by way of annexation of the Highlands instead of building those homes within the city, the city would give up \$45,820 in development fees from the 79 houses. D. 75, p. 56, Ex. 14. \$45,820 is thus what it costs Pleasant Grove to annex the developed area of the Highlands rather than an area of similar size in the area of the Western Addition.

As Judge MacKinnon wrote in dissent:

Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services.* [Emphasis in original]
[J. S. App. 24a]

WHEREFORE, appellant respectfully submits that the judgment of the district court should be reversed.

Respectfully submitted,

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No. 85-1244

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In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF PLEASANT GROVE, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, in a declaratory judgment action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the district court properly refused to authorize an all-white municipality to annex a vacant area zoned for residential development and an area exclusively inhabited by whites, upon a finding that these annexations were part of a racially biased annexation policy whose purpose was to include whites while excluding blacks from becoming voting residents of the city.

2. Whether the district court's finding that the annexations at issue were motivated by racially discriminatory purposes is clearly erroneous.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court issued October 25, 1985, denying appellant's claim for declaratory relief (J.S. App. 1a-26a), is reported at 623 F. Supp. 782. The opinion of the district court issued August 3, 1983, denying appellant's motion for summary judgment (J.S. App. 1b-17b), is reported at 568 F. Supp. 1455.

JURISDICTION

The three-judge district court entered its judgment on October 25, 1985 (J.S. App. 1a-26a). Appellant filed its notice of appeal on December 19, 1985 (J.S.

App. 1d). The jurisdictional statement was filed on January 23, 1986. This Court noted probable jurisdiction on May 19, 1986. The jurisdiction of this Court rests on 42 U.S.C. 1973c.

STATEMENT

A. Factual background

1. Since its incorporation in the 1930's the City of Pleasant Grove, a suburb of Birmingham, has been an "all-white enclave in an otherwise racially mixed area of Alabama" (J.S. App. 2b). Pleasant Grove has no city ordinances prohibiting racial discrimination in housing, employment, public accommodations or voting (D. 17, at 7-8).¹ The city's population of approximately 7,000 is all white except for approximately 32 black residents who live in nursing homes and are not registered to vote and a single black family that moved into the city after this action was filed (J.S. App. 2b n.3). The all-white character of Pleasant Grove stands in contrast to its environs. Jefferson County, in which the city is situated, had a population (in 1980) of 671,197, one-third of which is black (*id.* at 2b).² The city also abuts several unincorporated black communities (*ibid.*).

¹ Because the district court record is not paginated, but the docket sheet assigns a number to each document, citations, to the extent possible, will refer to document (D.), exhibit (Exh.), and page numbers.

² Other municipalities in west-central Jefferson County include Bessemer (31,729 persons, 51.28 percent black), Birmingham (284,413 persons, 55.63 percent black), Hueytown (13,309 persons, 9.66 percent black), and Fairfield (13,040 persons, 52.87 percent black) (J.S. App. 2b n.4; Def't Exh. 11, at 15-17; Def't Exh. 1).

2. Pleasant Grove has considered a total of ten annexation requests during its history. Four of these requests resulted in annexations. None of them brought any black residents into the city (J.S. App. 3a), and Pleasant Grove retained its racial homogeneity as its population grew from 1,066 in 1940 to 7,102 in 1980 (Def't Exh. 10).

In 1945, the city acted favorably on the petition of white property owners living to the southeast of the city (J.S. App. 3). In 1967, land to the north, west, and south of the city was annexed (*ibid.*). With the exception of an all-white community known as Early Town and two then all-white nursing homes, this annexation involved primarily undeveloped land (D. 17, at 3; 12/17/81 Cain Dep. 14, 15).³ In 1969, the city refused to annex the Kohler parcel. The record in the district court indicates that this refusal was based on fear that this annexation would produce a "mushroom effect" that would put pressure on the city to annex the adjacent black areas (4/2/81 Patrick Dep. 55-56, 103-104).

On the same day that a federal district court ordered the desegregation of the Jefferson County School System, the Pleasant Grove City Council voted to establish a separate all-white system in the city (J.S. App. 4b-5b). The next two annexation requests came from white residents of outlying areas who wanted their children to attend Pleasant Grove's all-white schools. Some two weeks after the creation of the city's separate school system, the all-white non-contiguous communities of Sylvan Springs and West Grove petitioned for consolidation and annexation

³ Today, much of that land is developed and, with the exception of 32 persons institutionalized at the nursing homes, all of the residents are white (D. 17, at 3).

respectively (*id.* at 3a n.2). The city facilitated the active pursuit of these requests, and it was only the failure to consent by intervening landowner United States Steel Corporation that prevented the annexation (*ibid.*).

In 1971, the city acted favorably on the request of members of a white family, the Glasgows, that the city annex the 40 acres of property on which they lived. This property, lying to the northwest of the city, was accessible only by traveling several miles outside the city past a black neighborhood that was not annexed (J.S. App. 4b). Because of the tract's topography, the Glasgow property offered no opportunity for further residential development (12/17/81 Patrick Dep. 48). According to one council member, the city annexed the Glasgow Addition because the residents were "'fine people'" whom the city "'would be proud to have as [residents]'" (J.S. App. 7a n.13 (citation omitted)). The mayor stated that it was done to allow the Glasgow children to attend the newly formed, all-white Pleasant Grove school system, rather than the recently desegregated Jefferson County system (4/2/81 Patrick Dep. 63-65; 12/17/81 Patrick Dep. 6-7).⁴ Shortly after the Glasgow annexation, the city refused to annex the area including the historically all-black Woodward School, according to the court below, in order to avoid the school desegregation order (J.S. App. 3a n.3; D. 23, at 4-5).⁵

⁴ In the course of this litigation, the city has referred to the Glasgow annexation as "a decision taken in the heat of a busing controversy" (D. 28, at 2 n.1).

⁵ Eventually, the United States Court of Appeals for the Fifth Circuit ordered the City's school system abolished and transferred control of the schools back to the county (J.S. App. 5b n.12). *Stout v. Jefferson County Board of Education*,

In 1978, the all-white Westminster area was denied annexation. The district court found, once again, that this decision was motivated by fear that the "mushroom effect" would create pressure to annex several adjacent black areas (J.S. App. 4a).

In 1979, the city undertook to annex the Western Addition, a parcel of 450 acres of uninhabited land to the west of the city. The tract was zoned for residential development and the city projected that 700 residences would be built. The city council voted on February 5, 1979 to annex the land, and Mayor Patrick then asked State Senator Parsons to introduce a bill in the Alabama State legislature to complete the annexation. The bill passed and was signed into law by the governor on July 17, 1979 (J.A. 16).

While the Western Addition annexation proceedings were pending in the state legislature, the city council voted to withdraw fire and paramedic services Pleasant Grove had previously provided to two areas adjacent to the city—the all-black Pleasant Grove Highlands (the Highlands) area and the largely black Dolomite area (J.A. 18-19). The quality of homes in the Highlands is comparable to all but the newest subdivisions in Pleasant Grove (Capps Dep. 12; 4/3/81 Cooper Dep. 14; Morrison Dep. 79; Medlock Dep. 9-11; 4/2/81 Patrick Dep. 91-92; Harris Dep. 14). On April 18, 1979, residents of the Highlands and a few residents of an area known as Five-Acre Road presented a petition for annexation to Mayor Patrick (J.A. 16). Soon thereafter, on May 7, 1979, representatives of the group petitioning for annexation met with members of the city council, expressing concern about the loss of fire and paramedic service

466 F.2d 1213 (5th Cir. 1972), cert. denied, 411 U.S. 930 (1973).

and voicing a general desire to become part of the city to have a say in future decisions affecting municipal services (4/2/81 Patrick Dep. 16-22; Mason Dep. 7-8, 24-25). On June 18, 1979, the city council voted to restore fire protection to the Highlands, noting that only one call for assistance had come from that area in all of 1978 (J.A. 16, 19). Since commencement of this action, the city has restored paramedic service to the Highlands (J.S. App. 7a), and it has continued as always to respond to calls for police coverage from the Highlands (*ibid.*). The city has never acted on the Highlands' petition for annexation.

While the Highlands petition was pending, residents of the Dolomite area also requested annexation, which request was rejected (J.S. App. 3a-4a, 4b).

In no instance of actual or proposed annexation did Pleasant Grove conduct a study to determine economic consequences to the city likely to result (J.S. App. 5a).

3. Because the Western Addition was projected for residential development and would thus change the boundary lines in city elections, Pleasant Grove was required to and did seek preclearance of the Western annexation from the Department of Justice, pursuant to Section 5 of the Voting Rights Act. By letter dated February 1, 1980, the Department denied preclearance on the ground that the city had failed to satisfy its burden of establishing that the land was not being annexed, at least in part, for the purpose of denying or abridging the right to vote on account of race (D. 24, Exh. F at 1-2).

B. District court proceedings

1. The city then filed this action on October 9, 1980, seeking a declaratory judgment (D. 1). During

discovery, the city revealed that it had never sought preclearance of the 1971 annexation of the Glasgow Addition, in 1971. On October 16, 1982, the court therefore ordered the city to seek preclearance of that annexation as part of the present action so that the annexations could be considered cumulatively (J.S. App. 1b n.1).

While this action was pending, the city represented to the court that it had established a committee in March 1981 to study the proposed annexation of the Highlands, which has never been acted upon (J.S. App. 5a). Two committee members, James Mosley and Clyde Morgan, testified, however, that they were not notified of their appointments until more than a year later, shortly before they received a May 24, 1982, letter from Mayor Morrison (*id.* at 6a n.10).⁶ A third committee member, Joe Cooper, had no recollection of his appointment or his service on the committee (*ibid.*).

If the committee met, it did so only once and never made any independent inquiry into the factual basis for the city's opposition to annexation of the Highlands (J.S. App. 6a). Of the committee members, only Mosley stated that he had reached a conclusion regarding the annexation: that the city should not act because the matter was in litigation (*id.* at 6a n.12). The committee never made a recommendation or issued a report (*ibid.*).

2. In a memorandum order filed August 3, 1983, the three-judge court denied the city's motion for summary judgment (J.S. App. 1b-17b). In so doing it rejected the city's arguments (1) that there was no

⁶ The letter contained data gathered by various city department heads and the mayor's opinion that the annexation would prove economically disadvantageous to the city (J.S. App. 6a).

evidence that its annexations had the purpose of abridging the rights of blacks to vote or had such an effect, and (2) that, regardless, a discriminatory purpose would not alone bar preclearance of the annexations.

The court found "an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life" (J.S. App. 3b). The court noted that in the 1940's the city council blocked construction of a "colored housing project" in the city and ordered the city attorney to draft a zoning ordinance designed to "restrict colored property" (*ibid.*). The court concluded that the city has maintained a segregated housing market since that time by directing marketing and advertising exclusively to white buyers (*ibid.* (citation omitted)).

The court commented further on the city's history of racial discrimination in education and employment. Prior to 1969, Pleasant Grove's schools, as part of the Jefferson County system, were segregated by race. On August 4, 1969, the very day that a federal court ordered Jefferson County to desegregate its schools, the Pleasant Grove City Council voted to secede from the county system and to establish its own school system (J.S. App. 4b-5b). The court also found it significant that although Jefferson County was one-third black, Pleasant Grove had never hired a black employee even though the city employs people who live as distant as 50 miles out of town (*id.* at 5b).

The court found that Pleasant Grove's annexation policy similarly followed a racially exclusionary pattern. Specifically, the court noted that the city annexed the all-white Glasgow Addition, which can only be reached by traveling past an unannexed black neighborhood, and that it refused to annex the Kohler and Westminster parcels because adjacent areas oc-

cupied by blacks might then seek annexation. Finally, the court stated that while the annexation of the Western Addition was underway, the city rejected or refused to act on the petitions of the Highlands and Dolomite, two black areas (J.S. App. 3b-4b). If unrebutted by the city, the court concluded, this record would warrant a finding that Pleasant Grove had pursued its annexations with the purpose of denying or abridging the right to vote on account of race (*id.* at 5b).

The court next rejected Pleasant Grove's arguments (1) that proof of discriminatory purpose, absent proof of effect, is insufficient to establish a violation of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and (2) that the absence of black voters in Pleasant Grove precluded a finding of discriminatory effect. The court held that a jurisdiction covered by Section 5 has the burden of proving the absence of *both* discriminatory purpose and effect (J.S. App. 6b-7b). Moreover, as the court noted (*id.* at 8b-9b), "[i]t would be incongruous if the City of Pleasant Grove, having succeeded in keeping all blacks out, could now successfully defend on the ground that there are no blacks in the city whose right to vote would be diluted by the annexation of white, but not black, subdivisions." While Pleasant Grove could not be required to annex contiguous areas merely because they contained black voters, it "may not annex adjacent white areas while applying a wholly different standard to black areas and failing to annex them based on that discriminatory standard" (*id.* at 10b-11b).

Judge MacKinnon dissented on the ground that the two annexations under consideration did not change the existing voting rights of any member of a minority group since the city did not contain any black

voters (J.S. App. 11b). Judge MacKinnon agreed with the majority's conclusion that the record supported a finding that Pleasant Grove's purpose was to "discriminate against blacks with respect to voting" (*id.* at 15b). He concluded, however, that a purpose to discriminate was insufficient to violate Section 5 absent any effect on minority voting strength within the city.

3. On October 25, 1985, the court decided the case on the merits, holding that Pleasant Grove had failed to carry its burden of proving that its annexation did not have a racially discriminatory purpose (J.S. App. 1a-26a).

Initially, the court found that the location of the Western Addition and the city's plans for its development would likely produce an all-white residential area (J.S. App. 4a n.5). The court then rejected the city's contention that its decision to annex the Glasgow and Western Additions, but not the black Highlands area, was economically motivated and not based on race. The court concluded that neither in connection with the Highlands petition nor the Western, Glasgow or other annexations, had the city studied in advance the economic advantages and disadvantages that would ensue (*id.* at 5a). As to the substance of the city's economic justification, the court found it to be "no more than a transparent attempt to put a valid gloss on decisions which plainly had a racial purpose" (*id.* at 10a).

The court cited several examples of arguments offered by the city to justify the different treatment of the annexation proposals, which, on analysis, proved to be plainly invalid. These arguments, concerning fire protection, streets and sanitation, and

police protection all relied on different premises and assumptions being invoked to assess costs associated with the annexation of black as opposed to white areas.⁷

⁷ For example, the city argued that annexation of the Highlands would have required three additional firefighter/paramedics and one additional rescue vehicle. The court responded that since Pleasant Grove already provided fire and paramedic services to the Highlands, no increased expenditures would be required. It also noted that the fire chief's estimated cost of serving the 79 homes in the Highlands was greater than his estimated cost of serving the 700 homes projected to be built in the Western Addition, even though the former is more accessible than the latter (J.S. App. 7a).

Similarly, the court found that the city had applied different methods for calculating the cost of providing street and sanitation services to the Highlands and the Western Addition. As a result, the city inflated the projected cost of providing such services to the Highlands. But, as the court found, if the same method of calculation is applied to both proposed annexations then the cost of providing services to the Highlands is less than to the Western Addition. This was true regardless of which method was employed, so long as the same method was used in both cases. Under one method, the result would be \$20,000 for the Western Addition and zero for the Highlands and under the other they would be \$81,900 for the Western Addition and \$6,917.24 for the Highlands. The court also noted that the Highlands residents had offered to continue their private garbage collection after annexation, whereas the city estimated that two new sanitation workers would have to be hired to service the Western Addition (J.S. App. 7a-8a).

The court next rejected the city's argument that providing police protection for the Highlands would prove costly, pointing out that because the Pleasant Grove police department already responds to calls in the Highlands, there should be no additional expense. The court also rejected the testimony of Pleasant Grove's police chief that the black residents of the Highlands are more "crime prone," noting that statistics

Finally, the court turned to Pleasant Grove's contentions about the relative development fees that would result from each of the annexations. As to the claim that the city would lose \$45,820 by annexing the 79 existing homes in the Highlands rather than building 79 new homes in the city, the court found a failure to include in the calculations the immediate tax revenues brought in by existing Highlands homes. It also found a failure to account for the fact that the Highlands contained enough undeveloped land for construction of 80 new homes.

As to the city's estimate of the sum that development fees in the Western Addition would generate, the court found the projected range of \$768,250 to \$1,424,500⁸ to be highly inflated (J.S. App. 9a). The court found even the lower of these figures to be unrealistic, in part because the city's projected tax revenues from the Western Addition exceeded those from the city's most expensive neighborhoods (*ibid.*). Moreover, the city failed to include in its calculations of the cost of annexing the Western Addition the need to construct a new fire station, a major traffic artery, and a new park (*id.* at 10a n.21). Overall, the court concluded that annexation of the Western Addition

did not bear out his characterization. It also rejected the city's projection of no new police costs for the proposed 700-home Western Addition (since the police chief testified that increased resources would be required) (J.S. App. 8a-9a).

⁸ In August 1980 counsel for the city had informed the United States that these fees would amount to \$768,250 over a four-year period. In a letter to the city council dated July 14, 1980, however, the mayor had estimated that fees over the same period would total \$1,014,600, but only a month earlier the mayor had estimated that annexation of the Western Addition would produce \$1,424,500 in development fees (J.S. App. 9a n.20).

would prove more costly to the city than annexation of the Highlands.

With regard to the Glasgow Addition, the court concluded that this annexation was economically disadvantageous to the city because of the area's inaccessibility to city fire and police services (J.S. App. 7a n.13).

In summation, the court stated (J.S. App. 12a):

The mass of evidence of a specific racially-based annexation policy, supported by what must be, for this day and age, an astonishing hostility to the presence and rights of black Americans, far overshadows and outweighs the City's feeble effort to portray its annexation policy as economically motivated.

Accordingly, it held that the city had failed to carry its burden of establishing that its annexation policy did not have the purpose of denying or abridging the right to vote on account of race or color.⁹

⁹ Judge MacKinnon again dissented. He disagreed with the majority's finding that the uninhabited Western Addition would be occupied exclusively by whites (J.S. App. 15a-17a). He then stated that only a purpose to achieve an impermissible effect related to voting could violate Section 5 and since the city did not contain any black voters, no such effect could result from annexation of the Western Addition (J.S. App. 18a-20a).

Judge MacKinnon acknowledged that the Glasgow area was inhabited exclusively by 14 members of a single white family at the time of annexation, but concluded that the city had annexed the area as a favor to the family, rather than for racial reasons. He stated that, regardless of the status of the Glasgow Addition, the annexation of the Western Addition should be approved since it involved completely uninhabited land (J.S. App. 17a-18a n.5).

Finally, Judge MacKinnon saw merit in the city's economic justification for its annexation policy. He stated that much

SUMMARY OF ARGUMENT

1. Section 5 of the Voting Rights Act requires a covered jurisdiction to submit for preclearance by the Attorney General or by declaratory judgment action in the District Court for the District of Columbia any change in a "qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting." In an action in the district court, whether brought initially or after preclearance has been denied by the Attorney General, the municipality has the burden of proving that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. 1973c).

2. This case arises from Pleasant Grove's efforts to annex two parcels of land. It is well settled that an annexation requires preclearance under Section 5 because it "constitutes a change in a 'standard, practice, or procedure with respect to voting' under the Act" (*City of Rome v. United States*, 446 U.S. 156 (1980); *Perkins v. Matthews*, 400 U.S. 379, 388-389 (1971)). When Pleasant Grove submitted the Western Addition for Section 5 review, the Attorney General objected, in accordance with his longstanding in-

of the city's revenue came from the distribution of water and gas to the surrounding area and that by annexing a developed area the city would be subsidizing the area by sharing with it the profits from this distribution. By contrast, an undeveloped area could be expected to pay for services by generating development fees. Although conceding that Pleasant Grove had not studied the economic consequences of its annexation decisions prior to making them, Judge MacKinnon stated that officials in a small town such as Pleasant Grove could be expected to understand these benefits without formal studies (J.S. App. 22a-26a).

terpretation of the statute, because the annexation was undertaken with a discriminatory purpose to include white voters while excluding black voters. The district court, also finding that the city failed to sustain its burden of proving the absence of discriminatory intent, refused to approve the proposed changes in the city's boundaries.

3. It is clear from the statutory language and well established in the case law (*City of Rome*, 446 U.S. at 172), that a jurisdiction's failure to prove an absence of discriminatory purpose, even where no immediate discriminatory consequences are apparent, fully justifies disapproval of a voting change. The city's arguments takes issue with this basic proposition.

Specifically, the city contends that because it presently has no black voters it is not possible for the annexations to have an effect on the voting rights of blacks. That argument is irrelevant, since the district court's judgment was based on discriminatory purpose, not effect. Even if the all-white composition of the city's population had not been the product of pervasive discrimination, as the district court found, this argument would fail because it reads the purpose element out of the statute. As the district court stated, however, the city's present racial homogeneity resulted from extraordinary efforts to perpetuate segregation. The city can scarcely rely on the absolute success of its exclusion of blacks to justify further annexations designed to bring in additional whites while excluding all blacks.

There is also no merit to the city's contention that it is entitled to judicial approval because the Western Addition is presently uninhabited. It has long been recognized that incorporation of undeveloped property

is a common method of municipal expansion and, especially when intended for residential development, that such annexations may well affect voting. Thus, since 1972, it has been the consistent practice of the Attorney General to require preclearance of annexations with any foreseeable effect on voting, even where the land involved is presently vacant, and this policy is reflected in this Court's decision in *City of Rome v. United States*, *supra* (nine of 13 annexations rejected by the Court were of tracts unpopulated when taken over by the city). This interpretation was made known to Congress on two occasions when extensions of the Voting Rights Act were under consideration. Congress twice reenacted the statute with no change in this regard.

4. The city also argues that the district court's factual findings should be brushed aside. Those findings of fact are not clearly erroneous, indeed they are amply supported by the record. The district court recounted Pleasant Grove's recurring official acts of discrimination in annexation, zoning, housing, and education. Based on a record that fully supported its finding of discriminatory purpose, the district court properly refused to order preclearance of the proposed annexations (J.S. App. 12a). That determination should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REFUSED TO AUTHORIZE ANNEXATIONS UNDERTAKEN WITH A RACIALLY DISCRIMINATORY PURPOSE

A. The statute and the decisions of this Court establish that a discriminatory purpose to include white voters and exclude black voters suffices to invalidate an annexation

Under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, a covered jurisdiction¹⁰ that enacts or seeks to administer any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," must seek preclearance either from the Attorney General or by the entry of a declaratory judgment by the United States District Court for the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." It has long been well settled that Congress intended these preclearance provisions of the Act to be given "the broadest possible scope," and to reach "any state enactment which altered the election of a covered state in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969).

As appellant concedes (Br. 19), it is well settled that the requirements of Section 5 of the Voting Rights Act must be satisfied when a political subdivision, such as the City of Pleasant Grove, expands its territorial boundaries. *City of Rome v. United States*, 446 U.S. 156, 187 (1980); *City of Richmond*

¹⁰ The State of Alabama is a covered jurisdiction for purposes of Section 5 (30 Fed. Reg. 9897 (1965)).

v. *United States*, 442 U.S. 358, 367-368 (1975); *City of Petersburg v. United States*, 410 U.S. 962 (1973), aff'g 354 F. Supp. 1021 (D.D.C. 1972); *Perkins v. Matthews*, 400 U.S. 379, 390-391 (1971); see S. Rep. 94-295, 94th Cong., 1st Sess. 16 (1975); 28 C.F.R. 51.12(e). Application of the extraordinary requirements of Section 5 to annexations is justified because "an annexation constitutes a change in a 'standard, practice, or procedure with respect to voting'" (*City of Rome*, 446 U.S. at 156) and acquisition of surrounding property can deny the right of suffrage " 'just as effectively as by wholly prohibiting the free exercise of the franchise' " (*Perkins*, 400 U.S. at 388, quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). As this Court recognized in *Perkins*, 400 U.S. at 388, the redrawing of boundary lines, as a general matter, affects voting because "by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not."

Based on the statute's use of the conjunctive, "does not have the purpose and will not have the effect," this Court has held that "Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent" (*City of Rome*, 446 U.S. at 172 (emphasis omitted)). See *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982); *City of Richmond v. United States*, 422 U.S. at 372; *Georgia v. United States*, 411 U.S. 526, 538 (1973); *Perkins*, 400 U.S. at 387, 388.

In *City of Richmond v. United States*, *supra*, this Court concluded that Richmond's annexation of additional territory did not have a discriminatory effect under Section 5, but it remanded the case for con-

sideration whether the annexation was motivated by a discriminatory purpose. The Court explained why an annexation that had been found not to have discriminatory effect had to be remanded to the district court for inquiry into its purpose (422 U.S. at 378 (emphasis added) (citations omitted)):

The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). Annexations animated by such a purpose have no credentials whatsoever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . ." * * * An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, *whatever its actual effect may have been or may be*.

To this end, the Court has refused to approve annexations that *increased* the black population in a district because the purpose of the change (to keep the black population from being even larger) was discriminatory. *Busbee v. Smith*, 459 U.S. 1166 (1983), aff'g 549 F. Supp. 494 (D.D.C. 1982). Similarly, in *Beer*, 425 U.S. at 141, the Court stated that even an *ameliorative* reapportionment scheme would violate Section 5 if "the new apportionment itself so

discriminates on the basis of race or color as to violate the Constitution" (see 425 U.S. at 142 n.14).

This Court's decisions also firmly establish that the annexing municipality has the burden of proving that its proposed expansion is undertaken without a discriminatory intent and that it will not have the effect of abridging the right to vote for minorities. *City of Rome*, 446 U.S. at 183 n.18; *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia v. United States*, 411 U.S. at 538. If the municipality fails to sustain its burden on either intent or effect, it is not entitled to judicial approval.

On the record in this case, the district court correctly withheld its approval of the Glasgow and Western annexations because they were part of the city's discriminatory policy. The annexations had a racially discriminatory purpose—to include areas occupied or likely to be occupied by whites, while excluding areas occupied by blacks—and were not entitled to judicial endorsement under Section 5. See *City of Richmond*, 422 U.S. at 378.

Of the two parcels of land involved, Glasgow was inhabited exclusively by whites and Western was intended for residential development of a type that has uniformly produced all-white neighborhoods in Pleasant Grove.¹¹ Contemporaneously with its decision to

¹¹ The city does not contest the court's finding that it was likely that the residential development would serve white citizens. The Western Addition is not adjacent to a black neighborhood, it was planned for single family residences such as prior annexations that resulted in all-white sections, and, when asked whether the planned residences would be populated mostly by white people, the mayor of Pleasant

annex the Western Addition, the city chose not to annex the all-black Highlands, even though the city concedes (Br. 7) that the housing stock in that neighborhood was of high quality.¹² Combined with the city's history of annexing only white or undeveloped areas (later populated by whites only) and refusing to annex any black areas, these decisions demonstrate that the city actively pursued a policy of redrawing its boundary lines to take in potential and actual white voters and to exclude black voters.¹³

Grove testified "I would think they would" (4/2/81 Patrick Dep. 83).

Because the area was zoned for residential development, it was apparent that Section 5 preclearance was indicated. Certain annexations, such as those of vacant land designated for use as a public park, do not require Section 5 review. Because Section 5 is concerned only with voting practices and procedures, the Attorney General does not require submission for preclearance of annexations of uninhabited land before such annexations take place. Rather, the Attorney General requires covered jurisdictions to submit such annexations for preclearance before inhabitants of the annexed area may vote in the annexing jurisdiction. Pleasant Grove voluntarily submitted its annexation of the Western Addition for preclearance before the area was inhabited and, therefore, any specific individuals sought to vote.

¹² The United States does not, nor has it ever, contended that the city's failure to annex surrounding black areas itself violated Section 5. Rather, the failure to annex these areas, while the city was simultaneously annexing non-black areas, is highly significant in demonstrating that the city's annexations here were purposefully designed to perpetuate Pleasant Grove as an enlarged enclave of white voters.

¹³ There is no merit to the city's contention (echoed by its supporting amicus) that the district court has required the annexation of the Highlands. All the court held was that the Glasgow and Western Additions did not satisfy Section 5; it

B. The absence of any black voters from Pleasant Grove does not suggest that the City lacked a discriminatory purpose with respect to voting

Pleasant Grove contends (Br. 18-21) that because it contains no black voters, its annexation of currently vacant land and land inhabited exclusively by whites cannot violate Section 5. In effect, the city seeks to rely on its unbroken history of racial exclusion (J.S. App. 3b) to argue that since it has no black voters it is impossible to abridge, restrict or "dilute" the votes of any blacks.

was those *changes* in the boundaries defining who could vote in city elections that brought Section 5 into play. Had the challenged annexations not occurred, the city's rejection of the Highlands' petition would not have occasioned Section 5 scrutiny. Of course, once the city sought preclearance of the Western Addition, its contemporaneous refusal to annex black areas was relevant to the inquiry into the purpose underlying the Western annexation.

Nor is there merit to the city's argument (Br. 23-24) that its refusal to annex the Highlands placed the black residents of that community in a better voting position than would have resulted from annexation. The city's anomalous argument that annexation of the Highlands would actually result in dilution of the voting strength of residents of the Highlands is supported by neither fact nor logic. Appellant contends that the black voters of the Highlands now are part of a significant minority in Jefferson County, but, if annexed, would constitute only an insignificant minority in Pleasant Grove. Nowhere, however, does the record suggest that residents of the Highlands would no longer participate in Jefferson County elections if they were annexed by Pleasant Grove. Quite the contrary. The record shows that voting "[r]egistration in Pleasant Grove is under the authority of the Jefferson County Board of Registrars" (J.A. 21). The net result of a Highlands annexation, therefore, would be that the Highlands residents would retain their voting strength in Jefferson County and would gain some voting strength in Pleasant Grove.

This argument rests on the erroneous premise (Br. 19) that annexation runs afoul of Section 5 only if it has a significant effect on present minority voting. The city's argument thus reads the purpose requirement out of the statute. Instead of imposing on an annexing jurisdiction the burden of satisfying two standards under Section 5, the city would diminish the burden so it need prove only the absence of an imminent discriminatory effect.¹⁴

More fundamentally, Pleasant Grove's argument distorts Congress's purpose in enacting Section 5. As this Court has observed (*Beer*, 425 U.S. at 140, quoting H.R. Rep. 94-196, 94th Cong., 1st Sess. 57-58 (1975) (footnote omitted)):

"Section 5 was a response to the common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law too, was discriminatory. . . . Congress therefore decided, as the Supreme Court

¹⁴ If appellant is correct that its all-white character precludes the possibility that any change in voting procedures would have an effect on blacks, the same defense could be made for an ordinance providing that no blacks may vote. While such a provision bluntly violates the Fifteenth Amendment it would appear to qualify for Section 5 preclearance under the city's theory. Similarly, based on its theory, Pleasant Grove could progressively annex every all-white community in the county and claim an entitlement to preclearance because there had been no "dilution" of black votes within the city. As is clear, the city's contention would drain Section 5 of vitality.

declared it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victims' by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'"

To head off such "adaptiveness" and to interdict changes having a "potential for racial discrimination" (*Perkins*, 400 U.S. at 388-389), Congress established the Section 5 preclearance mechanism, requiring that an act be discriminatory neither in purpose nor effect. As the district court found, Pleasant Grove's all-white character was not the result of benign happenstance. Certainly acts of selective annexation are no less objectionable under this statute on account of their complete success and the resulting fact that there are presently no black voters in the city.

C. The Western Addition annexation can not be justified on the ground that the area is uninhabited

The city also seeks to justify the Western Addition annexation (though not the Glasgow Addition) on the ground that the property is not yet developed, so that the annexation will not immediately alter the city's population, or have an immediate effect on voting. It is no less true, however, that this annexation of land likely to be developed as a white residential area,¹⁵ was plainly motivated by a discrimina-

¹⁵ Although appellant does not challenge the district court's finding that the annexed area was likely to be populated by whites, the dissenting judge in the lower court criticized that finding as "speculative" (J.S. App. 15a-16a). Such criticism is misplaced in the context of a statute, such as Section 5, that imposes a preclearance requirement. In discharging Section 5 responsibilities the Attorney General and the courts

tory purpose to increase the white but not the black political constituency of the city.

The practical consequence of Pleasant Grove's argument would be to exempt from Section 5 annexations of presently uninhabited property projected for residential development. In *City of Rome*, however, this Court affirmed the district court's refusal to approve 13 annexations, nine of which were of uninhabited land at the time of annexation. See 446 U.S. at 194, 196 (Powell, J., dissenting); *City of Rome v. United States*, 472 F. Supp. 221, 246 (D.D.C. 1979). The district court observed in that case that "cities frequently annex relatively unpopulated areas for purposes of future growth and development" (*id.* at 246-247). It would be anomalous to remove from the coverage of Section 5 so common a method of municipal expansion. See *Allen v. State Board of Elections*, 393 U.S. at 566.

frequently must project the anticipated consequences of municipal action. Thus, courts regularly assess the likely consequences of boundary changes in light of bloc voting patterns, historic levels of voter registration and similar factors.

On a broader level, the dissenting opinion suggests that based on the current facts, the effect of the annexations on any future black voters is speculative. The existence of future black voters in Pleasant Grove is not hypothetical however. During the pendency of this lawsuit, a black family moved into the city (Br. 20). Moreover, the city's two nursing homes house 32 black citizens. Although none of these residents is currently registered to vote, there is no reason to assume that they, or any future black residents, would not someday register and vote in the city. In any event, to say that the impact of the city's action is speculative is tantamount to saying that the city has failed to satisfy its burden of proving that the annexations "will not have" an effect on voting. Thus, even on the view of the facts espoused by the dissenting opinion, the judgment below should be affirmed.

D. The decision below is consistent with the longstanding interpretation of the Attorney General in implementing Section 5

The Attorney General's longstanding interpretation of Section 5 fully supports the district court.¹⁶ Since at least 1972, the Attorney General has consistently objected to selective annexations both of white and vacant areas that were motivated by racially discriminatory purposes, regardless of whether the annexation diluted the votes of minority voters remaining in the annexing jurisdiction.¹⁷ There is

¹⁶ Recognizing "the central role of the Attorney General in formulating and implementing [Section] 5," this Court has accorded considerable deference to his interpretation of its scope. *Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978). See also *Blanding v. DuBose*, 454 U.S. 393, 401 (1982); *NAACP v. Hampton County Election Comm'n*, No. 83-1015 (Feb. 27, 1985), slip op. 11 n.29.

¹⁷ The United States submitted to the district court a list of objections interposed by the Attorney General to annexations on the ground that they reflected racially selective annexation policies (D. 50). This list included objections to annexations by: Lake Providence, Louisiana (December 1, 1972); McComb, Mississippi (May 30, 1973, withdrawn October 21, 1974); McClellanville, South Carolina (May 6, 1974); Grenada, Mississippi (February 5, 1975); Lumberton City School District, Lumberton, North Carolina (June 2, 1975); Bessemer, Alabama (September 12, 1975); Statesboro, Georgia (December 10, 1979); and Pleasant Grove, Alabama (February 1, 1980).

Between 1965 and 1981, the Attorney General objected to only 245 of the 8,786 annexations submitted for Section 5 preclearance (D. 50, at 2 n.1). It has been the Attorney General's policy to object only if an annexation will dilute the votes of minority residents remaining in the submitting jurisdiction or, as in this case, the annexation will lead to voting changes and is motivated by a racially discriminatory purpose.

specific evidence in the legislative history of the 1975 and 1982 reenactments of Voting Rights Act reflecting the Attorney General's policy of requiring that certain annexations of vacant land be submitted for Section 5 preclearance and his policy of objecting to annexations when they have a racially discriminatory purpose. See U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 65 (1981) ("The Department of Justice most often objected to the annexations of predominantly white residential areas or to undeveloped areas zoned for middle-income housing"); S. Rep. No. 97-417, 97th Cong., 2d Sess. 10 n.21 (1982).

In both 1975 and 1982, complaints were made to Congress about the requirement of preclearance "where [the] area annexed does not include a single additional resident" (*Extension of the Voting Rights Act of 1965: Hearings on S. 407, et al., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 189 (1975) (statement of A. F. Summer, attorney general of Mississippi)). See 128 Cong. Rec. S7100 (daily ed. June 18, 1982) (remarks of Sen. Helms) (noting that the Department of Justice had objected to the "annexation of an undeveloped subdivision"). Indeed, in 1982, the Department of Justice apprised Congress of the very case now before this Court. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 2567 (1981) (*Hearings*) ("The Attorney General interposed a Section 5 objection to the annexation to Pleasant Grove of certain vacant land projected for

all-white residential development * * *.”);¹⁸ see *id.* at 194-195 (1975); S. Rep. No. 97-417, *supra*, at 13.¹⁹ The statute was reenacted without change in this regard in both 1975 and 1982. See *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131-135 (1978).

II. THE DISTRICT COURT'S FINDING THAT THE CITY FAILED TO PROVE THE ABSENCE OF DISCRIMINATORY PURPOSE FROM ITS ANNEXATION DECISIONS IS NOT CLEARLY ERRONEOUS

A. Pleasant Grove's annexation and other policies demonstrate a pervasive discriminatory purpose over a long period

The district court's finding that Pleasant Grove acted with a racially discriminatory purpose in annexing the Western and Glasgow Additions is a

¹⁸ See *Hearings* 1845 (attachment to testimony of E. Williams) (“the Department of Justice objected to an annexation plan submitted by Pleasant Grove, Alabama. The city population was 6,500 and exclusively white. The areas proposed for annexation were expected to be inhabited exclusively by whites. Several identifiably black areas had petitioned for annexation so as to derive the benefits of inclusion in the city, but the city had taken no action to annex these areas. Finally, the objection letter noted reports of ‘activities’ indicating the presence of considerable antagonism toward black persons in the vicinity of Pleasant Grove”).

¹⁹ Insofar as we have determined, it is true, as the city contends (Br. 24), that the Attorney General has never objected to another annexation where neither the annexing jurisdiction nor the annexed area contained black voters. However, this fact is explained by the rarity of a jurisdiction that does not contain any black voters, rather than by any government policy. As we have explained (pages 22-24, *supra*), the city's all-white population is scarcely a mitigating fact or warranting diminished Section 5 scrutiny.

factual finding that is subject to review under Fed. R. Civ. P. 52(a). *Anderson v. City of Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-9. See *Rogers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290 (1982); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534-537 (1979).

Since factfinding “‘is the basic responsibility of district courts, rather than appellate courts’” (*Pullman-Standard v. Swint*, 456 U.S. at 291 (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974))), this Court may reverse the trial court's findings only if they are clearly erroneous, *i.e.*, only if the evidence leaves this Court with the “‘definite and firm conviction that a mistake has been committed.’” *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1984)). “This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *Anderson v. City of Bessemer City*, slip op. 8. See *Maine v. Taylor*, No. 85-62 (June 23, 1985), slip op. 13-14.

The evidence establishes not only that the city failed to carry its burden of proving the absence of a discriminatory purpose, but that Pleasant Grove's annexations were in fact motivated by a racially discriminatory purpose. The city's annexation policy itself manifests a desire to exclude all blacks from the city while taking in substantial numbers of white voters. As the district court found, Pleasant Grove has annexed several white or vacant areas while never approving an annexation that would bring a single black resident into the city. Indeed, the district court found that the city was so committed to remain-

ing all white that it refused to annex two white areas—the Kohler and Westminster areas—because they feared a “mushroom effect” that would create pressure for the city to annex black areas adjacent to these white areas (see pages 3, 5, 8-9, *supra*). The city’s refusal to annex the black Highlands area, while nearly simultaneously annexing the Western Addition, which it projected would be inhabited by whites, demonstrates the central role that race occupied in the city’s annexation decisions, which is not contradicted by its efforts at statistical justification (see pages 31-36, *infra*).

Were there ambiguity about the purposes of the annexation policy viewed in isolation, the city’s extraordinary history of racially hostile acts, as chronicled by the district court, is virtually undisputed. In nearly every aspect of its public life, including housing, zoning, education, employment, and annexations, Pleasant Grove has evinced overt racial animus toward black citizens. It has never hired a black employee, although it has hired white employees from as far as fifty miles away. It seceded from the Jefferson County school system rather than submit to a court order to desegregate its schools. Its independent school system was subsequently abolished by court order.

The district court correctly held this history of discrimination to be probative in determining the purpose behind the city’s annexation decisions. See *Rogers v. Lodge*, 458 U.S. at 624-626; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). While a finding of racially discriminatory purpose in other areas of the city’s life is not a substitute for a finding of dis-

criminatory purpose in its annexations, the city’s pervasive history of discrimination in its public acts, which manifests an overriding objective to exclude blacks from the city, is highly relevant in evaluating the evidence bearing on the purpose behind the annexations under review.

B. The district court correctly found that the city’s economic justification for annexing the Western Addition was insubstantial and pretextual

Contrary to the city’s contention (Br. 25-26), the evidence fully supports the district court’s rejection of Pleasant Grove’s supposed economic justification for annexing the Western Addition but not the Highlands (J.S. App. 10a).

Indeed, Pleasant Grove does not challenge most of the district court’s findings regarding its purported economic defense. Those findings demonstrate that the economic justifications both for refusing to annex the Highlands and for annexing the Western Addition were developed after the decisions had already been made and were, thus, not factors in those decisions. Pleasant Grove asserts that it relied on its annexation committee in refusing to annex the Highlands. However, appointments to the committee, if they were made at all, were made a year after the city asserted they had been made. The committee met at most once and conducted no independent inquiry into the economic consequences of annexing the Highlands. It generated no documents and made no report regarding the proposed annexation. Similarly, no advance study was conducted of the economic consequences of annexing any other area (J.S. App. 5a).

Moreover, the district court found that the substance of the justifications lacked merit and demon-

strated that the city had applied entirely different standards in deciding whether to annex the Highlands and the Western Addition.²⁰ The city's submission rested on inflated figures for the cost of annexing the Highlands and on deflated cost figures for the Western Addition. Thus, the court rejected the city's estimate that three additional firefighters and paramedics would be necessary to serve the Highlands as "entirely without factual basis" in view of the city's repeated assertion that it was already providing fire and paramedic protection to the Highlands (J.S. App. 7a). It also found that the city's projected cost of providing these services to the 79 homes in the Highlands exceeded its estimated cost of providing the same services to the 700 homes planned for the Western Addition, even though the Highlands is more accessible to existing facilities than the Western Addition (*ibid.*). Similarly, the city applied different methods in calculating the cost of providing street and sanitation services to the two areas, which resulted in an inflated figure for the Highlands and an artificially low figure for the Western Addition. The court calculated that, in reality, under either method, the cost of providing these services to the Western Addition would far exceed the cost of providing the same services to the Highlands (J.S. App. 8a; see note 7, *supra*). Moreover, the city's calculations failed to take into

²⁰ In its motion for summary judgment (D. 25, at 5), the city offered this encapsulation of the pertinent facts that shows the dual tracks on which annexation decisions were made: the city council promptly approved the Western Addition, which was regarded as involving no "racial issue," whereas the Highlands petition "did confront the Council with a racial issue."

account the offer of the Highlands to continue to provide its own sanitation service.

The district court correctly found that the city's estimated high cost of providing police protection to the Highlands was based on the inaccurate characterization by Pleasant Grove's police chief of the black residents of the Highlands as "'crime prone'" (J.S. App. 8a). Actual crime statistics did not support that characterization and the court found that, in fact, the Highlands annexation would generate no new costs, since Pleasant Grove police already responded to calls in that community (*id.* at 8a-9a). By contrast, the city projected no increased costs as a result of providing police protection for the 700 new homes in the more remote Western Addition (*id.* at 9a).

The district court also found that Pleasant Grove had inflated its estimate of the revenue to be derived from the Western Addition and seriously underestimated the revenue that could be expected from the Highlands. Within the course of two months, the city's estimate of the amount of development fees it would receive from the Western Addition (over a four-year period) declined by half from \$1,424,500 to \$768,250. The district court found even this latter figure to be inflated (J.S. App. 9a).

In contrast, the city underestimated the revenue it would derive from annexation of the Highlands. The city first argued that it would lose some \$45,000 in development fees by annexing the existing 79 homes in the Highlands rather than having the same number of new homes built in the city. Significantly, the city failed to acknowledge that the Highlands contains a substantial tract of undeveloped land that

the court estimated could accommodate 80 new homes and would bring in substantial development fees, presumably slightly more than \$45,000. The city has not challenged any of the above findings.

Nor does the city challenge the district court's finding that annexation of the Highlands would produce immediate benefits for the city in the form of ad valorem tax revenues from developed property. The city argues, however (Br. 25), that ad valorem taxes would provide only between 14% and 28% of the additional expenses it would incur by annexing the Highlands. The record does not support this contention. The city bases its statement on affidavits submitted by Sarah A. Mays, Pleasant Grove's Secretary-Treasurer, in connection with her deposition in this case (J.A. 21). Ms. Mays examined the city's sources of revenue and identified those ad valorem items that could be expected to increase in proportion to the increase in population if Pleasant Grove annexed the Highlands. These items amounted to \$255,404 for the fiscal year ending September 30, 1980. She then calculated that the city's *total expenditures* for that same period amounted to \$1,790,951, noting that the former figure was 14% of the latter.²¹

While Ms. Mays estimated certain *revenues* that would increase as a result of annexing the Highlands,²² she made no effort to quantify the additional

²¹ Ms. Mays conceded on cross-examination that the city's expenditures for FY 1980 were distorted by a once-in-a-decade expenditure of approximately \$500,000 to resurface all of the city's roads. She calculated that without that expenditure the revenues that would be expected to increase in proportion to the population of the Highlands amounted to 24.6% of the city's total expenditures (Mays Dep. 43; J.A. 21-24).

²² Ms. Mays did not purport to measure all additional revenues the Highlands would generate. For example, the affi-

costs of that proposed annexation. Nor do Ms. Mays' calculations address whether the city would incur *any* additional costs by annexing the Highlands. Thus, contrary to the city's contention, the Mays affidavit does not show that the Highlands would generate only 14%, or 28%, of the *additional expenses* the city would incur by annexing that area.²³

The city's comparative economic justification for annexing the Western Addition and refusing to annex the Highlands consists of an after-the-fact totaling of the revenues to be derived from annexation of the Western Addition, without regard to the costs, and a corresponding calculation of the costs associated with annexation of the Highlands, without regard to the revenues. The method employed in this post hoc rationalization itself refutes the city's contention that economic considerations alone fueled its annexation decisions. Thus, while the failure to annex the Highlands area is not a change subject to Section 5 review, it lends further support to the district court's conclusion that the voting changes in-

davit does not include the significant fees that Pleasant Grove would receive if the vacant land in the Highlands were developed and 80 new homes erected. Thus, as is plain on its face, the Mays affidavit's discussion of revenues is limited to ad valorem taxes.

²³ The district court rejected all of the city's estimates of increased expenditures that would accrue from annexation of the Highlands. It found that no new expenditures would be required to provide fire, police or paramedic protection and discounted the city's estimated cost of providing street and sanitation service. The city has simply failed to identify any other specific expenditures that would increase as a result of annexation of the Highlands.

volved in the annexations that are under review were motivated by a discriminatory purpose.²⁴

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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²⁴ The city did not attempt to offer an economic justification for its annexation of the Glasgow Addition, nor has it challenged the district court's finding that this annexation imposed an economic burden on the city.

(9)
No. 85-1244

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CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

**On Appeal from The United States
District Court for the District of Columbia**

REPLY BRIEF

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REPLY BRIEF

The Government's brief fails to rebut Pleasant Grove's showing that the district court's findings with respect to the racial motivation for the city's annexation "policy" are clearly erroneous.

1. Pleasant Grove has not "[s]ince its incorporation in the 1930s . . . been an 'all-white enclave in an otherwise racially mixed area of Alabama' " (G. Br., p. 2). Until after the Glasgow Annexation and the development of the Pleasant Grove Highlands subdivision in the late 1970s (D. 78, pp. 80-81), Pleasant

Grove was surrounded by uninhabited land or land sparsely settled by white people (D 17, Ex. B; D. 80, G. Ex. 35)¹. Between 1933 and 1967 Pleasant Grove expanded in all directions, north, east, south, and west. City's Br., pp. 5-6. These annexations took in no black people and very few white for the simple reason that no black people and very few white people lived in the area immediately surrounding Pleasant Grove during that period. The postal and census maps filed below (D. 17, Ex. B; D. 80, G. Ex. 35) show that except for the Highlands and Dolomite to the southeast of the city the area surrounding Pleasant Grove remains almost completely undeveloped, and thus uninhabited, to this day.

The Government has never suggested, nor can it plausibly suggest, that the annexation of Dolomite is or ever was in the economic interest of Pleasant Grove. The Highlands, jointly with the Five-Acre Road area, was the first area inhabited by blacks to petition Pleasant Grove for annexation. It makes no sense, therefore, to say that before the decision not to annex the Highlands, the city had a policy not to annex black areas. The issue could not arise because there were no contiguous black areas to annex and none, therefore, had ever petitioned for annexation.

¹ In the 1980 Census there were 20 cities and towns reporting populations in the Birmingham Division of Jefferson County. The percentage of blacks living in four of these municipalities, Ful-tondale, Brookside, Mountain Brook, and Vestavia Hills was less than in Pleasant Grove. D. 35, G. Ex. 11. Thus, the list of municipalities with relatively larger black populations in the Government's brief (p. 2, n. 2) does not present a complete picture. Neither of these lists proves anything because the relevant fact is who lived in the immediate vicinity of Pleasant Grove.

2. Pleasant Grove proffered its refusal to annex two white areas, the Kohler and Westminster areas, as evidence that its annexation policy, to the extent there was one, was to annex undeveloped land rather than areas exclusively inhabited by whites. Mayor Patrick testified that the Kohler and Westminster areas were objectionable because they were developed and for the additional reason that their annexation would create the "mushroom" problem. D. 41g, p. 91, see pp. 55-56, 103-104. If "you take one, [then] I think from the gentlemen's standpoint you are going to find it difficult not to take the next one." D. 41g., p. 104. The Kohler area petitioned in 1969 before Pleasant Grove Highlands was developed. JA 8 and Ex. B. The Westminster area petitioned in 1979 (D. 78 p. 114) after the Highlands were developed, but the Westminster area borders on Dolomite, not the Highlands (D. 17, Ex. B).

Thus the "next one" is not the Highlands but Dolomite and the refusal to annex Dolomite is clearly commanded by economic considerations. Accordingly, the Government's interpretation of the Mayor's testimony as suggesting racial motivation (G. Br., p. 3) is erroneous.

3. It is an exaggeration to say, based on this record, that Pleasant Grove "facilitated the active pursuit" of the joint petition of Sylvan Springs and West Grove for annexation (G. Br., p. 4). The record reveals only that a petition was submitted, Pleasant Grove appointed a committee, the committee asked United States Steel Corporation, an intervening landowner, whether it was disposed to consent, and when United States Steel said no, the matter was dropped. D. 49, pp. 1-3. Although the record with respect to the ear-

lier annexations is sparse, what drove all these annexations, we respectfully submit, was not the city seeking to add people, but groups trying to get into Pleasant Grove, either as in the case of the Western Addition, developers or, as in the case of the Glasgow Addition and the Highlands, other groups seeking the high level of services and low level of taxes provided by the city's water and natural gas distribution business.

4. Despite the district court's statement to that effect which the Government's brief recites, Pleasant Grove did not argue in its motion for summary judgment that "proof of discriminatory purpose, absent proof of effect, is insufficient to establish a violation of Section 5 of the Voting Rights Act" (G. Br., p. 9). In that motion, after showing that the annexation of the Western Addition would have no discriminatory effect, the city made the following argument as to purpose.

The Mayor and each of the Councilmen in office on February 5, 1979, have stated under oath why they supported the annexation which was approved on that date. None stated that any racial issue ever arose, and there is no reason, in this specific context, why such an issue would have arisen. The petition to annex West Smithfield Manor [the Highlands] and the Five Acre Road area, which did confront the Council with a racial issue, was not submitted to the Mayor until more than two (2) months later. Because the proposed annexation could not conceivably have had the effect of denying blacks the right to vote on account of their race there

is no basis whatsoever for inferring that that was the purpose. A purpose of denying blacks the right to vote in Pleasant Grove would best be served not by annexation of land for development but by a policy of no-growth, because the sale of any house in Pleasant Grove brings with it some chance that a black person will purchase it. [D. 24, pp. 4-5, citations omitted]

The district court's error, we respectfully submit, derives from concentrating on the decision not to annex the Highlands, which is not subject to Section 5, rather than concentrating on the decision to annex the Western Addition, which is subject to Section 5. At the time the City Council of Pleasant Grove voted to annex the Western Addition, it was simply repeating a pattern it had established in 1967, with the approval of the Justice Department, to wit, annexing undeveloped land. At that time, the City Councilmen had no way of knowing that the Highlands, the first black area ever to be contiguous to the city and thus a legal candidate for annexation, would petition two months later for annexation.

Assuming *arguendo* that the Highlands was rejected for racial reasons, moreover, does not establish that the Western Annexation was approved for racial reasons. The Government's brief (pp. 31-36) argues at length that the city's economic justification for annexing the Western Addition was insubstantial and pretextual and concludes that the annexation was motivated by a discriminatory purpose. What the Government fails to say is what that discriminatory purpose was. Pleasant Grove, at the time it approved the Western Annexation, was all-white and had no

petition for annexation pending from black areas. What conceivable racial reason could the city have for annexing the Western Addition?

5. The Government's brief correctly summarizes the district court's findings concerning certain reports submitted by the city's fire and sanitation departments. G. Br., pp. 10-11, n. 9. Although it is true that these partly incorrect evaluations were produced by certain of the city's departments, they were never adopted by the city as the basis for its decision not to annex the Highlands, and they were not relied on by the city in this litigation (D. 91, p. 10; J.S. App. 23a).

6. The Government correctly asserts that if the Highlands were annexed, its inhabitants would retain their right to vote in Jefferson County elections. G. Br., p. 22. The city's suggestion that inhabitants of the Highlands would lose that right if annexed to Pleasant Grove (City's Br., p. 23) is incorrect. The legal argument which follows that suggestion, however, is still valid. Black control as a racial voting bloc of those services provided before annexation by Jefferson County, such as police, fire, street and sanitation, etc., but after annexation by Pleasant Grove, would be greatly diminished. Accordingly, with respect to voting for the essential services which local governments provide, the annexation would have a racially discriminatory effect.

7. Contrary to the statement in the Government's brief (p. 31) without citation to the record or the city's brief, Pleasant Grove does not assert that it relied on its annexation committee appointed after commencement of this litigation in refusing to annex the Highlands. In the parties' submissions on the merits

below both Pleasant Grove (D. 85, p. 9) and the Government (D. 90, p. 16) agreed, with appropriate citations to the record, that the committee made no recommendation to the City Council. Pleasant Grove never argued that it relied on a committee recommendation which according to its own argument was never made.

8. The Government's brief incorrectly summarizes the district court's findings concerning the city's estimate of the sum that development fees in the Western Addition would generate (G. Br., pp. 12, n.8, 33). The July 14, 1980, letter estimating \$1,014,600 in fees and the letter a month earlier estimating \$1,424,500 were written not to the city council but to the city's counsel (J.S. App. 9a; D. 76, Exs. 2 and 3). The letters were not relied on by the city in this litigation or even in its submission to the Justice Department. The letter to the Justice Department which contains the \$768,250 figure was also never relied on in this litigation. D. 66; Ex. 1, Attachment 5.

9. It is not true as the Government suggests that the city's comparative economic justification for annexing the Western Addition and refusing to annex the Highlands consists of a totalizing of the revenues to be derived from the annexation of the Western Addition, without regard to costs, and a corresponding calculation of the costs associated with annexation of the Highlands, without regard to revenues (G. Br., 35).

The city's analysis assumes that the annexation of the Highlands and the annexation of an equal number of homes in the Western Addition will bring in the same amount in *ad valorem* taxes. This assumption favors the Highlands because the development so far

planned for the Western Annexation is a continuation of Highland Forest, the city's most expensive neighborhood, with homes selling in the range of \$75,000 to \$150,000. D. 78, pp. 78-79. The Highland is roughly equivalent to the city's Timbercrest area where homes sell in the range of \$50,000 to 75,000. D. 78, p. 59. The city's analysis further assumes no capital improvements for either annexation because (1) the Government argues that none will be required if the Highlands is annexed and (2) the city council has never provided for any capital improvements with respect to the Western Addition, nor have the developers requested such improvements as a precondition to development (D. 78, pp. 70-71, 76-77).²

² The district court faulted the city without citation to the record for not deducting the cost of "such necessary construction as a new fire station, a major traffic artery, and a new neighborhood park" (J.S. App. 10a, n. 21). The testimony, however, was not that the construction was actually "necessary" in the sense that Pleasant Grove would not receive the expected development fees if the construction were not undertaken. Mayor Patrick testified that major capital expenditures would have to be made whatever direction the city chose to expand in, so that "you can't go both ways," but "id not say what would happen if the expenditures were not made. D. 78, p. 53. Mayor Morrison testified that the city already had reached capacity in its recreation areas (D. 30f, p. 40) and probably already needed an additional fire station, but "it is something in politics that somebody leaves for somebody else to do" (*id.*, p. 45). If a new fire station were not built, "it would simply mean the rate would go up, the insurance policy would go up on the City of Pleasant Grove" (*id.*, p. 44). The district court erred in not recognizing that additional capital facilities in the west of the city were already indicated by development in the western section of the much larger 1967 annexation and that these additional facilities, though desirable, were not a necessary precondition for receiving the expected development fees.

The city's calculations do not ignore the Highlands' capacity for development (G. Br., p. 33). Ms. Mays stated in her affidavit that she did not include "Building Permits" in the items of revenue to the city which might increase in approximate proportion to population if the city were to annex the Highlands because she had been told that there had been little recent development in the Highlands. JA 22, n. 1. Nothing in the record suggests that that conclusion is wrong.

The Western Addition annexation is more favorable economically not only in that the city will not give up \$45,820 in development fees on the first 79 houses but also in that the city will start receiving the \$45,820 before it has to provide any services.

The Government's argument that the cost of fire and police protection cannot be counted in assessing the costs of annexing the Highlands because these services are already provided free ignores (1) the fact that the services can be withdrawn at any time, (2) that the city can now give priority to emergencies within the city, and (3) that the reasons which led the city to provide free fire and police protection to its nearest neighbors will logically lead the city to again provide such services to its new nearest neighbors after the Highlands is annexed.³ If it really makes no difference that the fire and police protection is provided without legal obligation, why did the Highlands petition for annexation in reaction to the city's withdrawal of fire protection? Finally, should the Government make an argument which punishes Pleasant

³ The city's police jurisdiction, for example, extends one and one-half miles from the city limits. D. 30f, p. 6.

Grove for an act of generosity?

WHEREFORE, for the foregoing additional reasons, appellant respectfully submits that the judgment of the district court should be reversed.⁴

Respectfully submitted,

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⁴ There have been two developments which may affect the outcome of this case. First, Birmingham annexed the Highlands pursuant to a vote taken on August 13, 1985. However, the annexation was challenged and set aside. *T. J. Wilkinson, et al. v. City of Birmingham* (Circuit Court of the 10th Judicial Circuit of Alabama, Bessemer Division, decided June 19, 1986). The case is now on appeal to the Alabama Supreme Court. Second, the city now has five black homeowners and three black employees.

(6)
No. 85-1244

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

**On Appeal from the United States District Court
for the District of Columbia**

**BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF APPELLANT**

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Dated: July 3, 1986

QUESTIONS PRESENTED

1. Whether the annexation of undeveloped and unpopulated land by a municipality without any black voters is cognizable as a change in voting practice or procedure capable of denying or abridging the right to vote on account of race within the meaning of § 5 of the Voting Rights Act of 1965.

2. Whether racially neutral and racially inconsequential annexations of vacant and undeveloped lands can be rendered retroactively unacceptable for § 5 purposes because the jurisdiction seeking preclearance for those actions subsequently declines to annex an area substantially populated by blacks.

3. Whether the utilization of § 5 preclearance procedures as a means to force § 5 jurisdictions to undertake unrelated annexations which will substantially increase their black voting populations constitutes an invalid and illegal application of § 5.

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF or Foundation) is a nonprofit public interest law center that engages in litigation and the administrative process in matters affecting the public interest. WLF has more than 80,000 members located throughout the United States, including in the State of Alabama, whose interests the Foundation represents.

This brief is filed with the written consent of all parties.

WLF is strongly opposed to the improper judicial extension of federal legislation beyond the legitimate scope of the authorizing statute. Because that problem has been especially evident in some federal civil rights cases, WLF has been active in litigation involving the issue of whether the federal civil rights laws have been extended beyond their intended scope. Reflecting this concern, WLF recently filed briefs urging more restrained application of such federal laws in *Thornburg v. Gingles*, No. 83-1968, and *City of Riverside v. Santos Rivera*, No. 85-224, both cases argued this term in this Court.

This case presents what we believe to be an especially serious distortion of the Voting Rights Act of 1965 ("VRA"). Using its jurisdiction to review preclearance denials under § 5 of the VRA as a basis for reviewing other areas of local government activity, the U.S. District Court for the District of Columbia has effectively ordered a small Alabama town to undertake a financially disadvantageous annexation of a nearby black community. The court's decision seems to reflect the view that an all-white Southern jurisdiction covered by § 5 is subject to virtually unlimited court-ordered impositions merely on the basis of a history of past discrimination in unrelated areas.

WLF is concerned that the sound original objectives of the VRA are being improperly invoked to justify unprecedented judicial intrusions on local government autonomy. We believe this case represents a significant opportunity for this Court to address that problem.

STATEMENT OF THE CASE

In the interests of brevity, the *amicus curiae* adopts the statement of the case set forth in the brief of the appellant, the City of Pleasant Grove.

SUMMARY OF ARGUMENT

1. The only changes in voting standards, practices, or procedures arguably requiring § 5 preclearance by the City were the 1969 and 1979 annexations of essentially vacant and undeveloped land. Since the City itself had no black voters whose rights could be diluted or otherwise abridged by those annexations, and since the annexations were totally inconsequential in any event in terms of affecting the City's demography, those annexations could not possibly be objectionable under § 5. Further, to ascribe to the City a discriminatory purpose as to minority voting for an annexation which had no racial implications with respect to voting or otherwise is legally and logically insupportable.

2. Section 5 does not authorize courts to engage in plenary review of a city's policies and practices concerning matters not themselves subject to § 5 preclearance regulation. Lacking any basis for finding a discriminatory purpose in the City's actual annexations of undeveloped areas, the district court purported to establish a non-existent "linkage" between those annexations and the subsequent decision declining to annex the fully developed and substantially black Highlands area. But § 5 gives courts no warrant to roam at large in search of unrelated discriminatory acts not themselves subject to § 5 in order to supply a discriminatory purpose otherwise absent from the actual changes that call § 5 into play. If this Court endorses the district court's approach, federal courts will have unbridled license to use § 5 preclearance procedures as a device for imposing their own policy preferences on any jurisdiction that has a history of past discrimination.

3. The district court's decision reflects an insupportable distortion of the lofty but nonetheless limited purposes of the VRA. The court used the Act as a justification for compelling a small town to submit to an annexation it otherwise was legally entitled to decline. Section

5 of the VRA cannot lawfully be utilized to pressure local governments into accepting policy decisions which are not required by the VRA itself. Further, it is improper for § 5 to be used as an instrument for imposing arbitrary and punitive obligations upon a local government simply because it has a history of past discrimination considered shocking by the court. Here, notwithstanding that the annexations subject to preclearance were entirely unobjectionable in themselves, the court seized upon the City's mere inaction on a matter not subject to § 5 as a justification for extraordinary judicial interference in the City's self-governance. No reasonable reading of the VRA can justify such consequences.

ARGUMENT

Preliminary Statement

This case presents a glaring distortion of the goals underlying the Voting Rights Act of 1965 (hereafter "VRA"), 42 U.S.C. § 1973 *et seq.* Among other unprecedented conclusions, the district court held that (1) a city's annexation decisions can violate the VRA even where it has *no* minority voters whose rights could possibly be affected, and even where the annexations in question in no way affect, much less diminish, minority voting rights or minority voting power; (2) a city falls out of compliance with the VRA merely by *declining* to annex a developed and populated adjoining area which petitions for annexation, as long as that area is substantially populated by blacks; and (3) a city is required by the VRA to approve an annexation which would actually *dilute* the bloc voting power of the minority voters who would be included in the annexation.

The decision below stands for the proposition that the symbolic, sociological, and punitive applications of the VRA are more important than its specific legal purpose of securing full voting rights for minorities. The practical result in this case does nothing to advance either

the voting rights or the bloc voting efficacy of minorities. If anything, it would work to dilute the voting power of the affected blacks.¹

Legal abstractions aside, the only plausible rationale for the decision below is to punish an all-white jurisdiction for its alleged past race discrimination in areas *other than voting rights*. But the VRA cannot lawfully be invoked for that punitive and arbitrary purpose.

This Court should not countenance the lower court's attempt to distort the genuine objectives of the VRA for the purpose of inflicting a form of unfocused, gratuitous retribution against an all-white municipality for its alleged transgressions in areas entirely separate from voting and election practices.

I. ANNEXATIONS HAVING NO CONCEIVABLE CONSEQUENCES OR IMPACT AS TO ACTUAL MINORITY VOTING RIGHTS CANNOT BE OBJECTIONABLE UNDER § 5.

To place this case in perspective, it should be recalled that the precise issue is whether the City's annexations of two undeveloped, essentially vacant parcels in 1969 and 1979² constituted "changes" in voting practices hav-

¹ As the record shows, blacks living in the area which the district court would compel the City to annex exercised very substantial voting power in Jefferson County elections—where, for example two of the eight State Senators elected were black (D. 309, pp. 12-14, 24). In Pleasant Grove, however, the black voters of the Highlands area would be submerged in an overwhelmingly white electorate.

² The Glasgow addition, annexed 17 years ago in 1969, was inhabited by only a single white family of 14 persons (D. 17, p. 3, and Ex. B). This "population" is so inconsequential that it is appropriate to refer to the land as essentially vacant and uninhabited under the maxim *de minimis non curat lex*. The lower court misrepresented the facts by referring to the Glasgow addition and the Western addition as "white areas." The Western Addition, annexed in 1979, was literally and totally uninhabited.

ing the purpose or effect of denying or abridging the right to vote because of race or color. 42 U.S.C. § 1973c.

Although the district court has attempted to portray the subsequent *non*-annexation of the substantially black Pleasant Grove Highlands (hereafter referred to as the "Highlands") as though it too was an actionable "change" under § 5—or as though it were integrally related to the prior annexations of undeveloped lands—this is simply not the case. While the VRA has concededly been expanded well beyond its literal parameters by judicial construction, it has not yet been warped so drastically as to require § 5 preclearance every time a city declines to take some action which might be construed as favorable to minorities in general or to the general principles of integration. There must be a tangible, positive action or event to trigger § 5's requirements; otherwise a jurisdiction could never ascertain just when they were called into play. Eschewing an annexation—like, e.g., declining to seek construction of a high-rise apartment, or a mass transit station—simply does not implicate § 5.

There is no dispute that the City's electorate was all white at all times pertinent to this case. Nor, despite the lower court's disingenuous attempt to misportray the undeveloped land additions as "white areas," is there any genuine dispute concerning the fact that the annexed areas were essentially *unpopulated* and *undeveloped*. These circumstances, we submit, render these annexations as fundamentally and legally distinct from the potentially "diluting" annexations which alone have been held to raise problems under the VRA.

The fact that this Court has recognized that *some* annexations raise problems under § 5 by no means requires that *all* annexations have actionable voting rights consequences. See *City of Port Arthur v. United States*, 459 U.S. 159, 165 (1982) ("§ 5 was not intended to forbid all expansions of municipal borders that could be said to have diluted the voting power of particular groups in the com-

munity."). This is made clear by the principles and analysis underlying this Court's decisions applying the Act to particular annexations.

Perkins v. Mathews, 400 U.S. 379, 389 (1971), stressed that it is only where the annexation produces an identifiable change in the composition of the electorate—i.e., one having genuine potential to result in racial discrimination as to voting—that the VRA is implicated. In fact, the Court indicated that § 5 should come into play only where the election constituency is "*substantially*" changed. *Id.* at 391. The two annexations at issue here, even when considered together with the "*non*-annexation" of the Highlands, clearly do not produce that kind of identifiable change in the electorate. Indeed—other than the wholly inconsequential addition of a solitary household living in the Glasgow addition—the annexation measures in question produced *no change at all* in the composition of the electorate.

The annexation at issue in *Perkins* was held subject to § 5 specifically because it could significantly dilute the effectiveness of the minority voters already residing within the town in question. There is no comparable dilution effect or potential caused by the Pleasant Grove annexations. Hence, under the clear principles underlying this Court's *Perkins* decision, there can be no plausible § 5 objection in this case.

Other decisions of this Court also establish that annexations raise genuine voting right issues only where they entail cognizable voting or election *consequences*, such as minority vote dilution; the decisions do not establish that annexations *per se* always implicate the VRA. If the annexation has no meaningful voting or election consequences, it is not within the purview of the voting rights legislation. That is precisely the case here.

Thus, in *Beer v. United States*, 425 U.S. 130, 141 (1976), the Court stressed that

[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise. [Emphasis added.]

Clearly, the instant annexations of vacant land by an all-white city cannot possibly have a “retrogressive” effect on any minority voting rights. It is analogous to, say, a rural town in Utah annexing portions of a nearby desert wilderness—an event wholly without racial consequences relative to voting rights.

More recently, in *City of Port Arthur v. United States*, *supra*, 459 U.S. at 165-67, and *Lockhart v. United States*, 460 U.S. 124, 134 (1983), this Court has continued to recognize that it is only where annexations or other government actions work a “retrogressive” effect on the voting rights of actual minorities living within the affected unit that they can violate § 5. Thus, in rejecting voting rights complaints against certain proposed changes in *City of Lockhart v. United States*, 460 U.S. at 135, the Court stressed, “Although there may have been no improvement in their [i.e., the minorities’] voting strength, there has been no retrogression either.” This Court therefore ruled that the challenged changes were entitled to preclearance. *Id.* at 134.

In *City Comm. to Oppose Annexation v. City of Lynchburg*, 400 F. Supp. 568, 572 (W.D.Va.), *aff’d in part and vacated in part on other grounds*, 528 F.2d 816 (4th Cir. 1975), the court properly delimited the kind of annexations which trigger § 5’s requirements as follows: “. . . [A]nnexations which enlarge the number of voters in a city are changes in a ‘standard, practice, or procedure with respect to voting’ which are covered by § 5.” [emphasis added.]

The same consistent analysis precludes the finding of any valid grounds for denying preclearance in this case.

The thread that runs through all the cases where boundary enlargements were held subject to § 5 is the existence of a *genuine* threat, or the actuality, of minority vote dilution. There is no such possibility in this case. Whatever philosophical objections there may be to a Southern, all-white city’s annexations of essentially vacant, undeveloped lots of adjoining land, they are not actionable under the VRA.

In straining to find grounds to deny preclearance, the district court recognized that the vacant and undeveloped nature of the proposed additions was incompatible with any conventional claim that the annexations were discriminatory. As expressed in Judge MacKinnon’s forceful dissent (J.S. App. A pp. 15-17), the majority compensated for this deficiency in their § 5 theory by the simple expedient of misstating the facts. Thus, the district court’s opinion portrays the City as approving the annexation of “white areas”, while declining to annex the predominantly black Highlands area under an alleged double standard.

But the City was *not* annexing any “white areas”, and there was no double standard. It was following a fiscally sound and sensible policy of annexing undeveloped, essentially *vacant* areas which would maximize municipal revenues and minimize municipal costs. These were strictly land-use decisions based on sound and sensible economic considerations. They affected *no one’s* voting rights. Hence, it is illogical to subject such actions to the anomalous requirements and standards of the VRA. More to the point, it is contrary to the plain language of § 5.

The lower court’s language in its initial decision on summary judgment is especially instructive in this regard, for it inadvertently reveals the flawed analysis underlying this ruling. After stating that “the failure to annex is a violation of the Act provided a discriminatory purpose is shown,” the court attempted to clarify its holding as follows (J.S. App. B at pp. 10-11):

This does not mean, of course, that Pleasant Grove or any other community would be required to annex contiguous areas merely because such areas may be inhabited by blacks. But it does mean that a community may not annex adjacent white areas while applying a wholly different standard to black areas and failing to annex them based on that discriminatory standard.

The fallacy of this analysis lies in its glib but false premise that the City had in fact annexed "white areas" even while it declined to annex "black areas" under discriminatory standards. As the record confirms, the City did not annex "white areas" in this case. The Western addition was entirely vacant and undeveloped, a fact of record not in dispute. The Glasgow addition had only a single white family totaling 14 people, a wholly insignificant happenstance which does not alter the undeveloped character of the area under any reasonable standard. Moreover, the Glasgow annexation occurred so far in the past—i.e., in 1969, some *17 years ago*—that it is plainly invalid to compare its origins and purposes to those of the 1979 decisions respecting the Western and Highlands additions.

Nor did the court have any permissible basis for concluding that these additions were "white areas" on the convenient theory that it was likely that they would so develop in the future. Such judicial speculation cannot form the basis for denying preclearance under § 5. A city cannot be deemed in violation of the VRA because of a judge's mere prognostications and probability evaluations.

Nothing of record indicates that City decision-makers were considering voting rights consequences of any kind when they decided to annex the unpopulated Western addition, and it would have been bizarre if they had. They were too preoccupied with the practical economic realities of the decision to contemplate the near meta-

physical voting rights implications contrived by the Justice Department and the district court in this case.

These land annexations were racially neutral and racially inconsequential under any reasonable standard. They had no effects or implications with respect to voting or election practices. Thus, it was clear error for the court to equate them with the annexation of an area already populated with substantial numbers of white voters, as in cases such as *City of Richmond v. United States*, 422 U.S. 358 (1975).

II. THE LOWER COURT'S DECISION CONSTITUTES AN INVALID AND IMPROPER APPLICATION OF THE VOTING RIGHTS ACT.

A. The VRA Does Not Require Affirmative Measures By Government Units To Enlarge Their Minority Voting Base Through Annexation Of Areas Outside The Unit.

The charges leveled against the City in this case really have nothing to do with infringement or abridgement of the voting rights of any identifiable minority persons. Not a single black person's voting rights have been affected in any way by the City's annexation decisions. Nothing done, or not done, by the City in that respect has either deprived any black of the opportunity to vote, or diluted the impact of the "black vote" as a voting bloc. These facts are indisputable on the record in this case.

The *actual* reason for the lower court's ruling was the City's decision not to annex the predominantly black Highlands addition—even though this non-event, or inaction, would not trigger § 5 preclearance in itself. Against the backdrop of the City's prior annexations (one of them had occurred 10 years in the past) of two additions which were both essentially vacant and undeveloped, the district court imposed on Pleasant Grove what amounted to an "affirmative action" obligation to approve *any* annexation which would result in a higher proportion of black voting

residents in the City. In effect, the court ruled that it was illegal for an American town to exercise its judgment in declining to enlarge its borders. This is unprecedented judicial arrogation.

Although the legislative history of the VRA and its amendments is extremely expansive in describing the Act's scope, *see* H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News p. 2437 and S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982 Amendments) (May 25, 1982), it nowhere purports to approve a policy of court-ordered expansion of municipal borders, effectively requiring municipalities to act as the guarantors of the voting rights of citizens *other than their own*. But the district court's decision here is shaped and grounded on exactly such a policy.

The district court used its § 5 power not to further minority *voting* rights, but to advance broad, unarticulated social and racial goals which are manifestly beyond the legal scope of the VRA. In this, the district court committed a clear error of statutory interpretation and judicial excess.

The court utilized its power to approve the City's annexation of the unpopulated Western addition as a jurisdictional lever to force approval of a separate and totally unrelated annexation petition involving an entirely different kind of land area. But merely because the court has authority under § 5 to rule on particular annexations which a city *has* decided to undertake does not give it *carte blanche* to pronounce on the wisdom or validity of the City's unrelated decisions declining to approve other annexations. Nor does it give the federal courts authority to undertake what amounts to plenary review of a city's overall annexation policies. But here the court has used the carefully restricted § 5 power to impose its broad, liberal visions of desirable integration policy on this small Alabama town. This is simply not authorized by § 5.

As stated in *Beer v. United States*, 425 U.S. at 141, § 5 is properly confined to assuring that covered jurisdictions do not manipulate changes in their voting practices and rules so as to lead to retrogression in the voting rights of affected racial minorities. Clearly, the City's decision declining to annex the Highlands sector produced neither a "voting change" nor any "retrogression" in the effective exercise of the franchise by minorities. How can there be a § 5 problem when there is simply no change in voting or election practices? Under the standards of *Beer v. U.S.* and related cases, this "non-annexation" is merely a preservation of the status quo which raises no actionable consequences under the VRA.

Nor is the result any different if the "non-annexation" of the Highlands is viewed against the backdrop of the prior annexations of the Glasgow addition and the Western addition. Putting aside the fact that the 1969 Glasgow annexation is too remote in time to be lumped together with the 1979 denial of annexation of the Highlands as part of the same calculated annexation "policy," it is plain that a city's annexations of vacant and undeveloped nearby lands do not give rise to a legal obligation under VRA to make some offsetting annexation of minority-populated lands. Section 5 contains no "linkage" doctrine which authorizes the Justice Department or the district court to withhold preclearance of innocuous measures until the affected jurisdiction submits to policy concessions demanded in other areas of civil rights concern. Yet that is precisely the implication of the lower court's opinion in this case.

Thus, the district court brushed aside all legal and logical impediments to its § 5 ruling on the strength of its evident conviction that the City's past record of generalized discrimination offset any shortcomings of proof or precision in the particular proceeding before it. Even though the specific city actions before it could have no adverse impact on black *voting* rights, the court nonethe-

less concluded that a purpose to produce such an effect could be *inferred* from the generalized discriminatory conduct of the past.

By focusing on the City's separate decision against annexing the Highlands addition—a decision which by itself would clearly *not* be subject to § 5, since it would produce no voting “change”—the court attempts to supply a racial context for the prior annexations which were in fact racially neutral and purely economic in motive and result. The Western addition was annexed to provide additional vacant land subject to development which would generate needed fees and revenues for the City. There could be no discriminatory impact on the voting rights of minorities, since none resided in either the annexing unit or the annexed land. By any reasonable measure, the Western annexation was a racially neutral measure as to voting rights; it is nothing short of absurd to suggest that the annexation was undertaken for its oblique, speculative, and problematic impact on the voting rights of unknown minority persons. In that regard, it would have been much easier, and much more effective, for the City to do nothing and simply preserve the status quo.

If the vacant land annexations were racially neutral and simply inconsequential as to voting rights, then a subsequent development such as the refusal to annex the Highlands does not render them “retroactively” discriminatory. And if the City had no discriminatory purpose in the vacant land annexations, the court cannot supply this missing element by artificially linking those actions to the City's alleged motives in denying the Highlands annexation—a “non-change” which is not subject to or covered by the VRA.

If a city's change in voting practice warrants preclearance under § 5, it cannot properly be denied that preclearance because of a subsequent unrelated action (or inaction) which offends the Justice Department's general standards of virtuous race relations. Yet that is what occurred in this case.

The dangerous flaws of the district court's approach can best be understood by considering its natural consequences. It means that any jurisdiction covered by § 5³ can be denied preclearance for otherwise valid changes or actions (e.g., racially neutral annexations or necessary re-districting) merely because it subsequently declines to pursue measures which would increase the jurisdiction's minority voting population. For instance, a town's refusal to approve higher density zoning could be construed as racially discriminatory, and thus provide a basis for withholding preclearance of clearly nondiscriminatory, even remedial, voting law changes. In practical effect, this becomes a form of judicial compulsion for § 5 jurisdictions to submit automatically to *all* proposals leading to increased minority population. Under the district court's rationale, their failure to do so would endanger preclearance for any other necessary voting practice changes it may wish to undertake.

Surely, the VRA was never intended to serve as authority for such pervasive judicial control over municipal land use and growth policy.

Neither the caselaw nor the legislative history interpreting the VRA's aims and scope support the view that the Act can be used to dictate local decisions regarding community growth and land-use planning. Where a jurisdiction does not even have minority voters whose rights might be at risk or subject to dilution, its decision to pursue a particular growth policy is simply not a proper subject for the VRA. It might conceivably be a proper subject for federal housing law or other desegregation policy, but it is beyond the limited focus of the VRA.

Perhaps the most striking aspect of the lower court ruling is how it even goes beyond telling the City what it can do or not do with respect to voting and election prac-

³ By definition, any jurisdiction subject to § 5 will have a significant history of racial discrimination.

tices; the court's ruling here actually tells the City what it can *be*, or not be. It presumes to invoke the VRA to dictate what amounts to an affirmative obligation to expand the City's borders and its population.

The VRA clearly does not authorize such radical judicial usurpation. On the contrary, the Act only requires that such annexations as a municipality *does* decide to approve not be undertaken with the purpose or the effect of discriminating against minorities with respect to voting. But where, as here, a city *declines* to annex an area or areas, the VRA does not require the Justice Department or a three-judge court to examine the city's motives for merely retaining its existing borders. For purposes of § 5, non-annexation is a non-event, without legal consequence. *Perkins v. Matthews*, 400 U.S. at 388-89 (annexations call § 5 into play only insofar as they bring about a "revision of boundary lines" or "a change in the composition of the electorate"); *City of Lockhart v. United States*, 460 U.S. at 135 (§ 5 does not compel jurisdictions to adopt particular measures merely because they enhance the voting strength of minorities).

Dissenting in *Perkins v. Matthews*, *supra*, 400 U.S. at 398, Justice Harlan succinctly but cogently stated the simple fact that should control here: "Section 5 requires submission of changes 'with respect to voting' only." The non-annexation of the Highlands area was not a "change", and it had no effect on voting, by anyone, in Pleasant Grove. Hence, it was legally erroneous for the district court to deny preclearance on the basis of that declination.

B. Finding A History Of Generalized Discrimination Is No Substitute For Finding A Purpose To Deny Or Abridge The Right To Vote.

Significantly, the district court does not dispute the fact that the Pleasant Grove annexation decisions, taken together or separately, do not have the "effect" of denying or abridging any minority voting rights. Confronted

with a record that provided no evidence of a discriminatory effect on minority voting rights, the court turned the full force of its energies to the search for some form of discriminatory purpose.

The court clearly erred in finding a discriminatory purpose with respect to voting rights based upon a claimed racial "disparity" in the City's annexation practices. The record shows no genuine disparity in that regard. The Western addition was a vacant, undeveloped area and its annexation would be economically advantageous to the City for reasons such as the receipt of development fees. The Highlands area was already developed and populated, and its annexation would be economically disadvantageous. In light of such considerations, the decision to annex one but not the other was not race-based disparity, but prudent city management. The discriminatory purpose necessary to sustain the denial of preclearance must therefore be found elsewhere.

That left the district court with only the City's alleged history of generalized discrimination as a basis for finding a specific purpose to deny or abridge voting rights in its various annexation decisions. And the court was so preoccupied with what it considered to be an "astounding pattern" of discrimination in general (J.S. App. B p. 3) that it seemingly lost sight of the very specific requirements of the statute before it.

Although a purpose to discriminate in itself may suffice as grounds to deny preclearance, *City of Richmond*, *supra*, § 5 clearly specifies that only a purpose of "denying or abridging the right to vote on account of race or color" is cognizable for that purpose. 42 U.S.C. § 1973c [emphasis added].

The district court failed to address this critical distinction adequately in its unfocused findings of discriminatory purpose. It failed to recognize that past incidents of discrimination in other areas—such as employment practices or school integration—cannot substitute for dis-

criminatory purposes with respect to voting rights as specified in VRA § 5. This fundamental flaw in the court's analysis is fatal to the validity of its decision.

The district court justified its reliance on evidence of discrimination in areas unrelated to voting on the basis of this Court's holding in *Rogers v. Lodge*, 458 U.S. 613 (1982) (J.S. App. A, p. 10, n.22 and App. B, p. 4, n.10). *Rogers* was not a § 5 case at all, and it dealt with a county which, unlike Pleasant Grove, manifested extensive evidence of *voting practice* discrimination *against its own black citizens*, see *id.* at 623-24. It is distinguishable from this case in all respects, and, if anything, illustrates the significance of voting-related practices as the critical evidence of discriminatory purpose in voting rights cases.

The distinction between a § 2 case (such as *Rogers v. Lodge*) and a § 5 case is important in this respect. In *Lodge*, for instance, the issue was whether the county violated § 2 by its longstanding *maintenance* of an at-large system of elections over many years. In a § 5 case, by contrast, the question is whether a particular, tangible change in voting or election practice has the purpose or effect of limiting the voting rights of minorities. By definition, the question for the court under § 5 is more specific and narrowly focused on a discrete government action taken at a given point in time. It follows that the scope of factors relevant to determining discriminatory purposes should be more precisely focused as well in the § 5 context.

More importantly, *Rogers v. Lodge* does not hold that the discriminatory purpose prong of § 5 can be satisfied without *any* evidence of discriminatory practices related to the voting rights or opportunities of affected minority citizens. In *Lodge*, there was extensive evidence of longstanding discrimination against minority residents of the county specifically in the voting and election context—i.e., by means of literacy tests, poll taxes, and white pri-

maries. 458 U.S. at 623-25. Thus, *Lodge* stands only for the proposition that evidence of non-voting discrimination may be used to fortify existing evidence of specifically voting-related discrimination in § 2 cases. It does not begin to resolve the distinct issue of whether evidence of non-voting-related discrimination can *wholly substitute* for voting-related discrimination in a § 5 case. The language of § 5 itself addresses that question in plain terms, and it states unambiguously that only a specific purpose "of denying or abridging the *right to vote*" is cognizable.

Because the district court's decision on discriminatory purpose is contrary to this plain language of § 5, it cannot stand. It is evident that the court's strong abhorrence for the City's history of past discrimination allowed punitive considerations to supplant reasoned application of the statutory provisions. This Court should act to prevent such arbitrary misapplication of § 5 by admonishing the lower courts against injecting their social and policy predilections into the particularized and limited determination called for by that provision.

CONCLUSION

The district court's decision drastically exceeds the authorized bounds of the § 5 preclearance procedure and constitutes insupportable judicial intrusion on local government autonomy. The decision should be reversed in all respects.

Respectfully submitted,

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No. 85-1244

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF THE DEMOCRATIC NATIONAL
COMMITTEE AS AMICUS CURIAE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

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THE UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Democratic National Committee respectfully moves for leave to file a brief *amicus curiae* in the above-captioned proceeding, and in support thereof states:

1. While appellee has consented to filing of the attached brief *amicus curiae*, appellant has refused the Democratic National Committee's request for such consent.

2. As explained more fully in the attached brief, failure to affirm the decision below would substantially and adversely affect the Voting Rights Act, landmark legislation with respect to which the Democratic National Committee has a vital and continuing interest as well as special expertise not possessed by the parties.

3. Accordingly, the Democratic National Committee seeks this opportunity to make its views known to the Court and to assist the Court in its decision in this proceeding.

Counsel for the Democratic National Committee hereby respectfully request that the Court grant this Motion for Leave to File Brief *Amicus Curiae*.

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ON APPEAL FROM THE UNITED STATES
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**BRIEF OF THE DEMOCRATIC NATIONAL
COMMITTEE AS AMICUS CURIAE**

INTEREST OF AMICUS CURIAE

The Democratic National Committee has general responsibility for the conduct of the affairs of the Democratic Party between the Party's National Conventions. It is composed of representatives from the Party's constituent party organizations in each of the several states, the District of Columbia and American Territories; of delegates elected at large; and of several *ex officio* members drawn from other affiliated organizations. As one of the country's two major political parties, the Democratic Party is deeply familiar with the status of voting rights and electoral practices across the country. It has had a long and abiding interest in civil rights, and in particular, voting rights.

The Democratic Party was present at the creation of the Voting Rights Act. The Act, enacted in 1965, is part of the legacy of President John F. Kennedy and one of the proudest achievements of President Lyndon B. Johnson. In the twenty-one years since 1965, this country, particularly the South, has made enormous strides in the area of voting rights. It is closer now than ever to fulfilling the promise of the Fifteenth Amendment: that "the right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude". Yet, as the Democratic Party realized when it fought for the extension of the Act in 1982, and when it pledged in its 1984 platform to use its "full resources . . . to investigate and root out any discriminatory voting barriers", strict and vigorous enforcement of the Act remains necessary.

The Democratic Party is filing here as *amicus curiae* because it has a special interest in this landmark legislation—and because it believes that if appellant prevails, the spirit and the purpose and the promise of the Voting Rights Act will be irreparably injured. Appellant's view would do nothing less than create a retroactive "grandfather clause" that would give Pleasant Grove and towns like it—towns which have successfully preserved the last vestiges of the discrimination of the Old South—a virtual exemption from scrutiny under Section 5 of the Voting Rights Act. The Court's decision here could thus well determine the scope and vigor of the voting rights and civil rights legislation that the Democratic Party and others have fought so hard to achieve.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before this Court is a narrow one: Can an all-white municipality with a long history of purposeful discrimination, having successfully excluded black residents for decades, escape scrutiny under Section 5 of the Voting Rights Act because it has no black residents whose voting power can be diluted?

The all-white city of Pleasant Grove, Alabama, seeks a declaration under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, that its proposed annexation of a large, uninhabited parcel of land to its west has neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. Appellant Pleasant Grove bases its argument on the fact that it has no black residents and therefore its planned annexation cannot reduce black voting strength. As we show below, Pleasant Grove's plan falls afoul of both the "purpose" and the "effect" prongs of Section 5. The annexation proposal is animated by the same racially discriminatory intentions that have infected numerous Pleasant Grove policies, including those involving housing, zoning, hiring and education. Moreover, Pleasant Grove's plan would have the unmistakable effect of rewarding an all-white enclave for its extraordinary record of unmitigated past discrimination. Accordingly, this Court should affirm the judgment of the district court below and reject Pleasant Grove's request for declaratory judgment.

ARGUMENT

PLEASANT GROVE'S ANNEXATION PLAN VIOLATES SECTION 5 OF THE VOTING RIGHTS ACT.

The Voting Rights Act of 1965 was designed to eradicate "the blight of racial discrimination in voting", "an insidious and pervasive evil" that had dogged parts of the South since Reconstruction. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 309 (1966). The Act featured many stringent remedies—including bans on literacy tests and poll taxes and the imposition of federal monitors to scrutinize state compliance—but none was more essential than its Section 5. That section provided for the suspension of all new voting practices pending federal review and it flatly forbade states and localities from instituting any new such practices that had either the purpose *or* the effect "of denying or abridging the right to vote

on account of race or color". 42 U.S.C. § 1973c. In the years since its enactment, Section 5 has been deployed to monitor a range of potentially racially discriminatory voting practices, including reapportionment schemes,¹ changes in voting procedures,² changes in forms of government,³ and, most important for this case, municipal annexation plans.⁴

It is against this backdrop of vigorous judicial enforcement of Section 5 that appellant Pleasant Grove, an all-white Alabama municipality with a long legacy of racial discrimination, seeks a declaration from this Court that its plan to annex the uninhabited "Western Addition" is permissible.⁵ The crux of

¹ See, e.g., *Georgia v. United States*, 411 U.S. 526 (1973) (state forbidden from holding elections under reapportionment scheme deemed to violate Section 5).

² See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (broad array of electoral changes in Mississippi and Virginia held invalid in absence of Section 5 approval).

³ See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980) (city's plan to change election rules, ward system and residency requirements held to violate Section 5).

⁴ See, e.g., *Perkins v. Matthews*, 400 U.S. 379 (1971) (holding that city's annexations of adjacent areas without federal approval violate Section 5); *City of Richmond v. United States*, 422 U.S. 358 (1975) (conditioning approval of city's annexation of predominantly white area on shift from at-large to ward voting system); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, *aff'd*, 412 U.S. 901 (1973) (same); *City of Port Arthur v. United States*, 459 U.S. 159 (1983) (holding that in absence of other electoral reforms, city's annexation of predominantly white area so as to reduce black population from 45.21% to 40.56% impermissibly discriminated against black residents); *City of Rome v. United States*, 446 U.S. 156 (1980) (holding that annexation of 13 areas diluted black vote and thus violated Section 5).

⁵ Under Section 5, municipalities wishing to annex land must obtain either "preclearance" from the Justice Department or a declaratory judgment from the District Court for the District of Columbia. See 42 U.S.C. § 1973c. The Attorney General has denied Pleasant Grove preclearance for its proposed annexation in part because of Pleasant Grove's record of refusing to annex contiguous areas populated by blacks who had petitioned for annexation. J.S. App. 2b.

the city's argument is that its plan is somehow qualitatively different from those municipal annexations invalidated under Section 5 in the past. Its brief emphasizes two distinctions: (1) the fact that Pleasant Grove, because it is 100 percent white, has no black citizens whose voting power could be diluted; and (2) the fact that the land it seeks to annex is presently unoccupied. App. Br. 19. As the district court below concluded, however, these are distinctions without a difference. Pleasant Grove's plan fails both threshold tests for approval under Section 5 of the Voting Rights Act: it is born of a discriminatory purpose, and it promises to have a discriminatory effect. Unable to meet its burden of proving the absence of both these elements, Pleasant Grove's plan must fall.

A. Pleasant Grove's Annexation Plan Has the Impermissible Purpose of Depriving Blacks of Their Political and Voting Rights.

Municipal annexations proposed for the purpose of "denying or abridging the right to vote on account of race" are invalid under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c. This is so even when such annexations promise to have no racially discriminatory impact whatsoever. *Port Arthur v. United States*, 459 U.S. 159, 168 (1982). In this case, as the district court below found, Pleasant Grove's annexation plan evinces a "mass of evidence of a specific racially biased annexation policy, supported by what must be, for this day and age, an astonishing hostility to the presence and the rights of black Americans". J.S. App. 12a. It therefore cannot stand.

Pleasant Grove's brief oddly omits *any* discussion of Section 5's *purpose* requirement, confining its discussion to an attempted refutation of the government's *effect* argument. Appellant's failure to rebut the district court's finding that it acted with an impermissible discriminatory purpose in and of

itself warrants affirmance by this Court.⁶ As Section 5 explicitly states, and as this Court has repeatedly observed, municipalities seeking preclearance for an annexation under Section 5 have the burden of proving *both* non-discriminatory purpose and non-discriminatory effect. As this Court stated in *City of Richmond v. United States*, a case on which appellant's "effect" argument relies almost exclusively:

"An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race, has no legitimacy at all under our Constitution or under the [voting rights] statute. . . . Section 5 forbids voting changes taken with the purpose of denying the vote on grounds of race or color." 422 U.S. 358, 378 (1975).⁷

⁶ Even if appellant *did* challenge the district court's findings, it would have to prove them "clearly erroneous" in order to reverse. As this Court noted in *Pullman-Standard v. Swint*, district court findings on issues of intent are generally treated as factual matters and can only be overturned if clearly erroneous. 456 U.S. 273, 288 (1982). See also *Rogers v. Lodge*, 458 U.S. 618, 623 (1982) ("the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes"); *Thornburg v. Gingles*, 106 S.Ct. 2752 (1986) ("the clearly-erroneous test . . . is the appropriate standard for appellate review of a finding of vote dilution").

⁷ See also *City of Rome v. United States*, 446 U.S. 156, 172 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent") (emphasis in original); *City of Port Arthur*, 459 U.S. at 168 ("even if a [proposed] electoral scheme might otherwise be said to reflect the political strength of the minority community, the plan would nevertheless be invalid if adopted for racially-discriminatory purposes"); *City of Lockhart v. United States*, 460 U.S. 126, 130 (1983) (agreeing with district court that cities "must prove both the absence of discriminatory effect and discriminatory purposes"); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1027 (D.D.C. 1972) (stating that municipalities proposing electoral changes confront "heavy burden" of proving both no discriminatory purpose and no discriminatory effect).

Pleasant Grove's racial bias has manifested itself in numerous ways. These include:

1. Pleasant Grove's Discriminatory Record Towards Annexation Requests

The city's record of responses to annexation opportunities in the recent past demonstrates a clear preference for white communities. As the district court below noted:

"During its history, Pleasant Grove approved the following four annexation requests: a parcel of land to the southwest of the city (1945); land in the northern, southern and western areas (1967); the Glasgow Addition (1971) and the Western Addition (1979). None of these areas had any black residents. During the same period, the city rejected annexation petitions from the Woodward School (August, 1971), the Pleasant Grove Highlands (April 18, 1979) and the Dolomite area (October, 1979). Each of these areas has been identified as a 'black' area." J.S. App. 3a-4a (footnotes omitted).

Moreover, in the two instances in which the city has chosen *not* to annex predominantly white areas, it has done so out of fear that "such annexations might have a 'mushroom effect' leading to subsequent annexations of adjacent black areas". J.S. App. 4a n.4. This, obviously, is not a legitimate fear under Section 5 of the Voting Rights Act—or otherwise.⁸

⁸ Rather than attempt to account for its glaringly suspect track record, Pleasant Grove takes refuge in specious evidentiary claims. The city suggests in its brief that, because its refusal to annex the black Highlands occurred *after* its decision to seek annexation of the Western Addition, the district court erred in even considering the city's Highland's decision. App. Br. 21. That is wrong. This Court has made clear that an invidious purpose properly may be inferred from *all* relevant facts. See *infra* note 9.

Pleasant Grove also seeks to impeach the district court's use of the contrast with the black Highlands by arguing that "a non-change [the city's decision not to annex the Highlands] does not have a discriminatory effect." App. Br. 21. One need look no further than *Rogers v. Lodge*, 458 U.S. 614 (1982), in which this Court held that the mere *maintenance* of an at-large voting system amounted to a discriminatory purpose, to see the error of the City's position.

2. Pleasant Grove's Record of Distortions

The pretexts and distortions to which Pleasant Grove has resorted in defense of its annexation practices also provide ample evidence of the city's racially discriminatory intent. The city's explanations for the refusal to annex the black Highlands is particularly illuminating in this regard. For example:

(a) When asked to explain its rejection of the Highlands site, the city asserted that it had relied on the economic determinations of its "Annexation Committee". In fact, as found by the district court below:

(i) the committee's members were not notified of their appointments until *one year later*;

(ii) the committee met only once—if at all; and

(iii) the only information at the committee's disposal came from city officials hostile to the annexation of the black community. J.S. App. 5a-6a.

The city's reliance on the report of this committee was rightly found by the district court below to be nothing more than "a sham". J.S. App. 6a.

(b) Pleasant Grove asserts that annexing the black Highlands would not be financially advantageous, but it performed *no* economic studies and *never* "assess[ed]" the economic or other impacts of annexation" prior to deciding not to annex the Highlands or the other three black neighborhoods. J.S. App. 5a.

(c) The city's *post hoc* economic justifications for its decision to annex the Western Addition, not the black Highlands, like its reliance on the Annexation Committee, are mere sham:

(i) The city asserted that annexing the black Highlands would require it to hire extra firefighters and

purchase rescue equipment, at considerable cost. In fact, as the district court found, there would be *no* additional cost—Pleasant Grove *already* was providing such services to the Highlands. J.S. App. 7a.

(ii) Furthermore, the city "applied entirely different cost methods for the needs of the [black] Highlands than they did for the [uninhabited] Western Addition"; its budget calculations ignored the considerable tax revenues that the black area would generate for the city; and it employed "highly inflated" figures to account for the revenues that the Western Addition would bring in. J.S. App. 7a-10a.

(iii) Moreover, as the trial court noted, the city's estimates of the relative costs of serving the black Highland and the uninhabited Western Additions are highly dubious. The city's "anticipated cost for serving the 79 homes in the [black] Highlands was more than the estimated cost of serving the 700 projected homes in the [unoccupied] Western Highlands addition although the former is more easily accessible than the latter". J.S. App. 7a. Indeed, appellant concedes that "the Highlands is in appearance equal economically to all but the newest subdivisions in the city". App. Br. 7.

This consistent record of distortion, as found by the court below, "far overshadows and outweighs the city's feeble efforts to portray its annexation policy as economically motivated". J.S. App. 12a. It is more than ample to support the district court's finding that Pleasant Grove's purported rationale was "no more than a transparent attempt to put a valid gloss on decisions which plainly had a racial purpose". J.S. App. 10a.

3. Pleasant Grove's Long History of Racial Discrimination

Finally, Pleasant Grove's unwavering history of city-sanctioned racial discrimination appropriately gives rise to the inference that its decision to annex the Western Addition emanates from racial bias. As this Court noted in *Rogers v. Lodge*, in which it struck down a Georgia county's at-large election system, "evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination". 458 U.S. 613, 625 (1982).⁹

Racial discrimination has permeated numerous corners of Pleasant Grove life. As the district court found, the city's housing and zoning policies have long directly and indirectly excluded blacks. J.S. App. 10a-11a.¹⁰ Most recently, the city has actively sought to perpetuate its racial homogeneity by "operating a dual white-black housing market through a variety of devices, such as advertising and marketing directed exclusively to white buyers, and racial steering". J.S. App. 11a. Moreover, the district court found, Pleasant Grove "has never hired a black person, preferring to draw its employees from as far away as fifty miles rather than to hire blacks living in surrounding Jefferson County, which is one-third black." J.S. App. 11a. Its educational practices, too, have exuded racial bias. When an Alabama federal court ordered the county to

⁹ See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977) (proof of discriminatory intent requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"; the "historical background of a decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes"); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("invidious discriminatory purpose may often be inferred from the totality of relevant facts"); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) (imputing discriminatory purpose to county in Section 5 challenge to at-large voting system).

¹⁰ See also *Wheeler v. City of Pleasant Grove*, C.A. No. 78-G-1150-5 (N.D. Ala. 1979) (holding that Pleasant Grove's exclusionary zoning ordinance had an impermissibly racially restrictive effect).

integrate its school system seventeen years ago,¹¹ Pleasant Grove voted to *secede* from the county school system that very evening. J.S. App. 11a. For five more years, until 1972, the city maintained its own separate "white" school system, financed by steep local taxes. That system ended only when the Fifth Circuit abolished it by court order.¹² The list of other city actions manifesting racial bias is as lengthy and as recent as it is shocking.¹³

Pleasant Grove's racially discriminatory purposes, in short, could not be more clear. The city's long and still unfolding record of excluding blacks; its long-standing refusal to annex any black areas even as it was welcoming white ones; and the egregious set of distortions to which it has resorted when asked to account for its skewed annexation record—all point to impermissible intentions. A city need not flatly declare its racial animus in order for it to have its plans invalidated under Section 5, *see supra* note 9, yet in this case, Pleasant Grove has done just that. To uphold Pleasant Grove's annexation plan would be to read the "purpose" requirement out of Section 5 altogether. That this Court should not do.

B. Pleasant Grove's Annexation Plan Would Have the Impermissible Effects of Depriving Blacks of Voting Rights and of Rewarding the City for its Past Discrimination.

Regardless of a municipality's purposes, annexation plans or other changes of voting practice that have the effect of

¹¹ See *Stout v. Jefferson County Board of Education*, C.A. No. 65-396 (N.D. Ala. 1969).

¹² See *Stout v. Jefferson County Board of Education*, No. 72-1102, *aff'd*, 466 F.2d 1213 (5th Cir. 1972).

¹³ The district court, rejecting Pleasant Grove's motion for summary judgment below, took note of the following other Pleasant Grove actions:

"It may also be noted that the city council has authorized the formation of a chapter of the White Citizens Council; thanked Governor George Wallace for his fight against integration; and condemned the Birmingham Bar Association for its expression of moral support to District Judge Pointer for his efforts in *Stout*." J.S. App. 5b n.13.

“undervalu[ing] the black strength in the community after annexation” are invalid. *City of Richmond*, 422 U.S. at 372. In this case, approval of Pleasant Grove’s plans to annex the Western Addition would not only operate to disenfranchise blacks. It would also have the perverse and wholly unjustified effect of rewarding Pleasant Grove for its “astounding” record of past discrimination. *See supra* at 5; *see also* J.S. App. 10a-12a. Accordingly, this Court should reject Pleasant Grove’s annexation proposal as an extreme violation of the “effect” prong of Section 5.

1. The Fact that the Western Addition Is Presently Uninhabited in No Way Minimizes the Deleterious Impact the Annexation Would Have Upon Blacks.

Appellant’s argument proceeds from the assumption that because the 439 acres comprising the Western Addition are at present uninhabited, the annexation would have no impact on black voting strength. That assumption is wrong. As the district court below specifically found, “while the Western Addition is undeveloped, its location and the city’s plans indicate that *it is likely to be developed for use by white persons only*”. J. S. App. 4a n.5 (emphasis added).¹⁴ Pleasant Grove’s action thus implicates one of this Court’s two primary fears about municipal boundary revisions. That fear is that, “by including certain voters within the city and leaving others outside, [the city] determines who may vote in the municipal election and who may not”. *Perkins v. Matthews*, 400 U.S. 379, 388 (1971).¹⁵

¹⁴ Moreover, the city asserted below that it expects to receive annual tax revenues from Western Addition homes that will outstrip those of the city’s most expensive homes. J.S. App. 9a. That projection strongly indicates that Pleasant Grove contemplates that the Western Addition will emerge as an expensive—and thus likely white—suburb.

¹⁵ The other, separate concern about municipal annexations, according to *Perkins*, is that they can “dilute the weight of the votes of the voters to whom the franchise was limited before the annexation”. 400 U.S. at 388. Appellant, again reading this Court’s Section 5 jurisprudence through very selective lenses, wholly ignores the Court’s “fencing-out” concern and instead emphasizes only its concerns about

Appellant’s broader suggestion—that the strictures of the Voting Rights Act cannot apply to annexations of unpopulated land—represents a misreading of Congress’s purposes in enacting Section 5. It is obvious to anyone that the addition of an unpopulated tract of land to a community may not affect voting power *at the instant moment*. Yet, as Congress knew when it passed Section 5, time does not stand still. As this Court emphasized in *Perkins*, “§ 5 was designed to cover changes having the *potential* for racial discrimination”. 400 U.S. at 389 (emphasis added). Appellant’s time-bound analysis—like Judge MacKinnon’s dissenting observation that other means of redress exist to deter future city misconduct, *see* J.S. App. 22a—is thus unduly narrow. Section 5 is a rule aimed not only at present violations but also at threats of future ones. *See Dougherty County Board of Education v. White*, 439 U.S. 32, 42 (1978) (focus of Section 5 includes “potential for discrimination”).¹⁶ The likelihood found by the trial court that the Western Addition will become an all-white enclave upon being incorporated into Pleasant Grove makes this annexation bid a particularly appropriate one for Section 5 invalidation.¹⁷

Pleasant Grove seeks to suggest that because its annexation plan involves an uninhabited area, it is qualitatively different

minority-vote dilution. *See also Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (municipal boundary redefinition that operates to exclude blacks held to violate Fifteenth Amendment).

¹⁶ *See also* Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. Rev. 189, 221 n.195 (noting that Justice Department often rejects preclearance requests in annexation cases in light of *anticipated* development of areas).

¹⁷ Pleasant Grove cynically suggests that its Western Addition annexation plan would actually serve the interests of the Highlands’ black residents *better* than the Highlands annexation proposal endorsed by a petition of those residents. The city states, “Instead of voting as a part of a significant minority in Jefferson County (where two out of eight state senators in the county delegation were black in 1979), the blacks residing in the Highlands [if annexed to Pleasant Grove] would vote as an insignificant minority where all councilmanic seats are elected at large”. App. Br. 23. The import of this argument is that Pleasant Grove knows better than the Highlands’ residents what is best for them. Such reasoning could result in precisely the sort of separatism and segregation that the framers of the Voting Rights Act sought to curb.

from the Section 5 annexation cases which this Court has previously considered. App. Br. 19. In fact, its scheme is only a new incarnation of an old yet apparently resilient theme in voting rights history: the attempt by some localities to exploit loopholes in the civil rights laws. As this Court noted in *Beer v. United States*, a legislative reapportionment case that along with *City of Richmond* provides the purported foundation of appellant's claims:

"Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 94-196 at 57-58).

This Court must not allow Pleasant Grove to skirt its legal obligations by finding purported loopholes in Section 5 jurisprudence. As this Court asserted long ago, the Fifteenth Amendment, under whose aegis the Voting Rights Act was passed, "nullifies sophisticated as well as simple-minded modes of discrimination". *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Pleasant Grove's plan cannot survive Section 5 scrutiny.¹⁸

¹⁸ Appellant's "defense" amounts to a repeated invocation of *Beer*'s "no retrogression" principle and of *City of Richmond*'s prohibition upon "significant proportionate reductions" of minority voting power. See App. Br. 12, 17. Such reliance is disingenuous. The verbal formulations of *Beer* and *City of Richmond* were fashioned in cases where municipal actions whittled down black voting power; thus, judicial tests focusing on "before" and "after" comparisons of proportions were wholly appropriate. Those courts did not have before them—and thus did not try to resolve—a case in which there were no black residents. In this case, by contrast, the proportion of Pleasant Grove votes wielded by blacks is *already* as low as it can ever be: it is 0%. To appellant, this fact means that there is *nothing* Pleasant Grove can possibly do that would violate Section 5, for "retrogression" is literally impossible when one starts at ground zero. That is hardly what this Court intended when it used the term "retrogression".

2. A Decision to Authorize Pleasant Grove's Annexation Plan Would Have the Impermissible Effect of Rewarding the City for Its Past Discrimination.

Pleasant Grove's "effect" argument hinges on its assertion that "because there were no black voters in Pleasant Grove . . . these annexations neither reduced the proportion of black voters in Pleasant Grove nor denied black voters representation equivalent to their political strength in the enlarged community". App. Br. 19. For the city to use its racial homogeneity as a rationale for escaping review under the Voting Rights Act is cynical in the extreme. Pleasant Grove's policies of racial discrimination and exclusion in virtually every walk of life are undeniably largely responsible for the city's failure to attract black residents. Allowing the city to bootstrap its legacy of discrimination into a successful end-run around the Voting Rights Act would send the perverse signal that discrimination can be its own reward. This Court must not send that message.¹⁹

¹⁹ As the district court below aptly observed, "it would be incongruous if the city of Pleasant Grove, having succeeded in keeping all blacks out, could now successfully defend on the ground that there are no blacks in the city whose right to vote would be diluted by the annexation of white but not black subdivisions". J.S. App. 8b-9b.

Indeed, by appellant's logic, those cities that had no blacks at the time the Voting Rights Act was passed effectively received "grandfather clause" exemptions protecting them from the Act's strictures. Nothing in the history of the Act supports that interpretation in the slightest.

CONCLUSION

Section 5 of the Voting Rights Act was designed to prevent electoral changes having either the purpose or the effect of depriving blacks of their right to vote. Pleasant Grove's plan to annex the "Western Addition" is such an impermissible change, for it both bears a discriminatory purpose and threatens to have a discriminatory effect. The Democratic National Committee respectfully urges that the Court affirm the judgment of the district court below.

Respectfully submitted,

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